No. (1)

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

BIODIVERSITY ASSOCIATES, et al.,

Petitioners,

v.

LYLE K. LAVERTY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

1. Whether legislation dictating exact management actions to be taken by executive officers of the U.S. Forest Service and mandating particular forest management techniques in a specific narrow geographic area is unconstitutional as violating the Separation of Powers Doctrine by impermissibly executing the law rather than enacting it.

PARTIES

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STATEMENT OF BASIS FOR JURISDICTION

This petition is seeking review of the decision of the U.S. Appeals Court for the Tenth Circuit entered on February 4, 2004 holding Section 706 of the "2002 Supplemental Appropriations Act for Further Recovery From and Response To Terrorist Attacks on the United States," Public Law No: 107-206 (Aug. 2, 2002) constitutional, affirming the District Court's final order denying enforcement of a previous court order entering a settlement agreement between the parties. All claims of the parties were disposed of by that final order.

The case involves a challenge to a timber sale proposed by the Forest Service, and the BCA had exhausted all administrative remedies. The District Court's initial subject matter jurisdiction was under the Administrative Procedures Act. The initial case resulted in a settlement agreement, and the District Court retained jurisdiction to enforce that agreement. Congress later passed a rider to an appropriations bill to override the settlement and dictate exact and precise actions the Forest Service must take to manage the area at issue, going so far as to design a project different from what the agency originally proposed. Appellants challenged the constitutionality of the Section 706 Rider which purported to supercede the settlement and all other applicable laws.

This Court has jurisdiction to consider the judgment of the court below on an important question of federal law this court has not previously considered on a writ of certiorari pursuant to 28 U.S.C. §1254(1).

LEGAL PROVISIONS INVOLVED

1. "The executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1.

2. The President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

STATEMENT OF THE CASE

On October 12, 1999, the Chief of the U.S. Forest Service declared certain provisions of the 1997 Revised Black Hills National Forest Plan to be invalid. The National Environmental Management Act Environmental Impact Statement for the timber sale involved in this case was based on that Plan.

The timber sale was proposed by the U.S. Forest Service for parts of the Beaver Park Roadless Area in the Black Hills National Forest in South Dakota. The Appellants Biodiversity Associates (now know as Biodiversity Conservation Associates) and Brian Brademeyer (hereinafter collectively referred to as "BCA") and other plaintiffs challenged the timber sale because of its reliance on the invalid provisions of the Revised Plan.

The lawsuit resulted in a Settlement Agreement entered by the U.S. District Court for the District of Colorado on September 6, 2000. App. 1. The essence of the agreement was to provisionally prohibit logging projects in the Beaver Park area pending the approval of a new Land and Resources Management Plan, with a specific exemption for logging projects specifically necessary for fire management. The Settlement also stated that the "Forest

Service will prepare an EA/FONSI or an EIS for actions to reduce the potential threat of mountain pine beetles and related fire hazard in and around the Beaver Park Project Area, as defined in the Notice of Intent of November 11, 1999." *Id.*

The problem upon which appellants are seeking review arose when Congress acted to overrule the decision of the appellants and the Forest Service and to address the alleged fire risk in the Black Hills National Forest.

On August 2, 2002, President Bush signed the Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States with the attached Section 706 Rider. Section 706 of the "2002 Supplemental Appropriations Act for Further Recovery From and Response To Terrorist Attacks on the United States," Public Law No: 107-206 (Aug. 2, 2002) (hereinafter called the "706 Rider") App.24. Congress stated that it passed the 706 Rider because neither the legal system nor the specialists at the administrative agency were capable of addressing the fire danger in the Black Hills National Forest. 706 Rider (a).

The directive refers to two parcels of land within the National Forest. Congress ordered, among other things, logging and other ground-disturbing actions in the Black Hills National Forest, notably in the Beaver Park Roadless Area. Not simply eliminating the applicable environmental and administrative procedures, the Rider orders the Secretary of Agriculture to take specific actions and gives technical specifications. "The Secretary shall establish 400-foot fuel breaks..." 706 Rider(d)(3) "The Grizzly Timber Sale shall proceed..." 706 Rider (g). The stated purpose of the legislature's action is "to authorize and direct the Secretary of Agriculture to undertake actions..." 706 Rider(b)(1).

On September 13, 2002, BCA filed a motion with the

District Court to declare the 706 Rider unconstitutional and to order the Forest Service to comply with the Settlement Agreement. The basis for the District Court's jurisdiction over that case was under 28 U.S.C. § 1331.

After receiving briefs and hearing oral argument, the District Court denied the motion on November 26, 2002, with an oral order issued immediately after the final oral argument. App.37. On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed the District Court's finding in a judgment filed on February 4, 2004. *Biodiversity Assocs. v. Cables*, No.03-1002, 2004 U.S. App. LEXIS 1702 (10th Cir. Colo. Feb. 4, 2004). App.49.

ARGUMENT

This court should allow a writ of certiorari to determine the question presented in this petition, because it is an important question of federal law that has not been settled by this Court.

It is undisputed that Congress' role is to create laws and that any action to apply or execute the laws by Congress is a violation of the Constitutional doctrine of separation of powers. The issue before the court is whether legislation that directs administrative officers to take specific actions giving detailed techniques by which to accomplish them, without attempting to change the applicable laws, is a violation of the Constitution.

The Constitution created a separation of powers

The United States Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1. Further, the Constitution states that the President "shall take Care that the

Laws be faithfully executed." U.S. Const. Art. II, § 3. On the other hand, the Constitution also provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. With this separation of powers, "[t]he Framers . . . built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S.Ct. 612, 684 (1976).

The Supreme Court has interpreted the above Constitutional provisions such that "[t]he structure of the Constitution does not permit Congress to execute laws." *Bowsher v. Synar*, 478 U.S. 714, 726, 106 S.Ct. 3181, 3188 (1986). "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . . ." *Springer v. Philippine Islands*, 277 U.S. 189, 202, 48 S.Ct. 480, 482 (1928). "The Supreme Court has stated that '[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.'" *Stop H-3 v. Dole*, 870 F.2d 1419, 1434 (9th Cir. 1989) quoting *Bowsher*, 478 U.S. at 733, 106 S.Ct. at 3192.

Congress' legislative power has also been defined by the Supreme Court as those actions which "have the purpose and effect of altering the legal rights, duties, and relations of persons . . . ." *I.N.S. v. Chadha*, 462 U.S. 917, 952, 103 S.Ct. 2764, 2784 (1983). However, "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher*, 478 U.S. at 733-34, 106 S.Ct. at 3191 citing *Chadha*, 462 U.S. at 958, 103 S.Ct. at 2787-2789. Further, "[t]he Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-on branch

approves of the encroachment." *New York v. United States*, 505 U.S. 144, 182, 112 S.Ct. 2408, 2431 (1992).

The 706 Rider unconstitutionally executes law

It is equally undisputed that Congress may not execute the law. The language of the 706 Rider makes it clear that Congress was not attempting to legislate and change the law, but rather was administering specific actions at a specific time and place. Congress directed the actions of the administrative agency, taking over tasks legally delegated to the executive branch, without changing the applicable law.

This Rider does not purport to change the laws, but rather suspends their application. "[A]ctions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law..." The language in the Rider attempting to insulate this congressional act from judicial review reveals the attempt to circumvent the legal system without changing the law. If this were a permissible alternation in the law by congress, there would be no need to suspend the normal functioning of the legal system. If they had changed the law, any court would be required to enforce the new law. In this case, because the congress did not change the law but simply ordered an officer of the executive branch to take certain actions under certain current factual circumstances, they felt compelled to try to escape the normal functioning of our tripartite government.

The 706 Rider is not of general application, even for the small parcels of land affected. The legislation does not apply to all national forests or even to the specific national forest at issue. Rather, the Rider applies to two parcels of land in the Black Hills National Forest, one of which is a

Wildlife Preserve and one of which was eligible to be designated as Wilderness. Further, the language does not change the laws as applied to these to areas. In fact, the legislation simply directs immediate and specific actions.

Although there is no express time limitation on these orders, the findings and purposes sections suggest that these orders are to be carried out only until the immediate danger of fire has been alleviated. "[T]o authorize and direct the Secretary of Agriculture to undertake actions to address promptly the risk of fire and insect infestation." The 706 Rider (b).

Laws change the rights and duties and relations of people as applicable to differing factual situations. *Chadha*, 462 U.S. at 952, 103 S.Ct. at 2784. The 706 Rider is applicable only to these parcels, at this time, and orders a certain factual outcome.

The Forest Service asserted in the District Court that the effect of Congress' enacting Section 706 is to merely waive the applicable environmental statutes, and that such a waiver does not compel any findings under law. This Court in *Seattle Audubon Soc. v. Robertson*, 503 U.S. 429, 112 S.Ct. 1407 (1992), concerned itself with the specific language of § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990 (hereinafter § 318). Section 318(b)(6)(a) provided, in part:

> "[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section....is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al*....."

Use of the phrase "adequate consideration" is noteworthy. Justice Thomas, writing for a unanimous Court in *Seattle Audubon*, based the decision of the Court upon the principle that the provisions of § 318 modified the applicable provisions of the MBTA and the other provisions of law that gave rise to the underlying lawsuits in the cases affected by that legislation, to wit:

> "Thus under subsection (b)(6)(a), the agencies could satisfy their MBTA obligations in either of two ways: by managing their lands so as neither to 'kill' nor 'take' any northern spotted owl within the meaning of 2, or by managing their lands so as not to violate the prohibitions of subsections (b)(3) and (b)(5). Subsection (b)(6)(a) operated identically as well upon all provisions of NEPA, NFMA, FLPMA, and OCLA that formed 'the basis for' the original lawsuits."

Seattle Audubon, 503 U.S. at 438, 112 S. Ct. at 1413.

Section 706 fails to provide this sort of even-handed application of law to the underlying basis for BCA's original lawsuit, nor does it provide anything resembling either an express or implied change in underlying law as was the case with § 318. Section 706 makes no attempt to modify the provisions of law that were at issue in BCA's original lawsuit and seeks solely to affect the results of the Court's adjudication of this case.

Although this Court has not yet found a case that crosses the line from permissible legislation to impermissible execution of laws by Congress, it has made it clear that such a line exists. In *Seattle Audubon,* the Supreme Court ruled that Congress could replace the legal standards underlying existing court cases with those set forth in a rider dealing

with management of the National Forests as long as they did not direct particular applications under either the old or the new standards. Critical to the Court's holding in that case were these findings:

> "We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law. Before subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting violated none of five old provisions. Under subsection (b)(6)(A), by contrast, those same claims would fail if the harvesting violated neither of two new provisions. Its operation, we think, modified the old provisions. Moreover, we find nothing in subsection (b)(6)(A) that purported to direct any particular findings of fact or applications of law, old or new, to fact. For challenges to sales offered before or after fiscal year 1990, subsection (b)(6)(A) expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents authorizing the sales. For challenges to sales offered during fiscal year 1990, subsection (g)(1) expressly provided for judicial determination of the lawfulness of those sales. Section 318 did not instruct the courts whether any particular timber sales would violate subsections (b)(3) and (b)(5), just as the MBTA, for example, does not instruct the courts whether particular sales would "kill" or "take" any northern spotted owl. Indeed, § 318 could not instruct that any particular BLM timber sales were lawful under the new standards, because subsection (b)(5) incorporated by reference the harvesting prohibitions imposed by a BLM agreement not yet in

existence when the Compromise was enacted. See n. 1, supra."

503 U.S. at 438-39, 112 S.Ct. at 1413.

In *Seattle Audubon* this court made it clear that Congress may not direct findings of fact or applications of law. Appellants call upon the Court today to clarify the limits of such inappropriate congressional action by considering the constitutionality of the 706 Rider. Unlike in *Seattle Audubon,* the Rider at issue does indeed compel findings and results. The 706 Rider removes administrative discretion and mandates specific results, straying into the authority of the Executive branch. The Rider executes the law in a way forbidden to Congress. Thus, the Rider violates the constitutional doctrine of separation of powers.

The 706 Rider does not perform any of the legislative functions of making new law, nor in any way, expressly or implicitly, change the underlying requirements contained in the laws dealing with management of the National Forests. See *Springer v. Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480 (1928); *I.N.S. v. Chadha*, 462 U.S. 917, 103 S.Ct. 2764 (1983). Instead, the 706 Rider directly mandates that the Executive branch interpret and enforce the law in the particular manner commanded by Congress. Such a mandate strips from the Executive the duty to "take care that the laws be faithfully executed." See U.S. Const. Art. II, § 3. These are functions reserved by the Constitution to the Executive branch only. Such a congressional mandate results in an aggrandizement of congressional power at the expense of the Department of Agriculture.

As set out in *Armuchee Alliance v. King*, 922 F. Supp. 1541, 1550 (ND Ga. 1996):

"As to Plaintiff's first argument, the Court

> agrees with Defendants that the Salvage Timber Rider does not direct specific factual findings or results. To the contrary, the Salvage Timber Rider simply compels changes in existing laws by adding an additional method by which those laws may be satisfied. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 437-40, 118 L. Ed. 2d 73, 112 S. Ct. 1407 (1992)."

As the court there found, the "salvage rider" at issue there **DID NOT** direct specific factual findings or results but changed underlying law. On the contrary, in this case, the 706 Rider goes into great detail in directing specific findings, actions and results.

The 706 Rider specifies exactly how the Forest Service must manage the two parcels of land and exactly what actions they must take. This specificity reveals that the 706 Rider does indeed violate the separation of powers under the standards set in *Seattle Audubon*. Congress passed the 706 Rider with the unconstitutional effect of expanding the powers of Congress into the realm granted to the Executive branch. Through this provision, Congress specifically ordered the Executive branch to carry out a duty which had been expressly delegated to the Department of Agriculture: the management of the Black Hills National Forest. In so doing, Congress unconstitutionally dictated the methods and specific activities of administrative officers. See *Bowsher*, 478 U.S. 714 (1986).

The text of the 706 Rider is rife with instances where Congress mandates specific results, assuming duties of the administrative agency. In relation to the creation of skid trails, the 706 Rider (c)(4) provides:

> "(4) SKID TRAILS—Notwithstanding the

Settlement, the Secretary may authorize access by skid trails to the additional treatment areas referred to in this subsection to remove or treat infested stands, except that the skid trails otherwise restricted by the settlement shall be restored to pre-existing conditions upon completion of treatment activities."

In relation to the creation of helispots, the 706 Rider (e)(4) provides:

> "HELISPOTS--If sufficient openings for helispots are not available in the Beaver Park Roadless Area, the Secretary is authorized to construct two 5-acre helispots within the Area to transport firefighters and fire equipment into and out of the area."

In relation to timber harvesting in the Forbes Gulch area, the 706 Rider (d)(5) provides:

> "(5) FORBES GULCH—To reduce concentrated heavy fuels, the Secretary is authorized to treat not more than 700 acres within the area identified as Forbes Gulch...."

These and many other provisions of the 706 Rider clearly mandate results different than what would be required under existing law and what is required in the Settlement Agreement and the District Court's Order adopting that agreement. Moreover, Congress chose to create its own definition of what would be acceptable skid trail construction in the first phrase of the 706 Rider (c)(4), yet opted to adhere to the terms of the settlement agreement for the latter portion of that subsection. Nowhere do the

provisions of the 706 Rider change the underlying process for determining the propriety of these skid trails, or any of the other actions required by the 706 Rider. Rather, these actions are specifically prohibited under the Settlement Agreement or are illegal under applicable law.

Finally, the language of the 706 Rider removes the discretion of the Secretary of Agriculture for managing the national forests, as applied to these two parcels of land at this particular time. Without expressly changing the laws that determine the duties of this executive officer, Congress cannot order him to take specified actions as they freely do in the 706 Rider.

> "(5) COMPLETION OF TREATMENT ACTIVIES – The Secretary shall request timber purchasers to give priority to completing treatment..." the 706 Rider (c)(5).

> "(g) GRIZZLY TIMBER SALE -- The Grizzly Timber Sale shall proceed..." the 706 Rider (g).

Since the 706 Rider did not change any provision of federal law, the Forest Service's reliance on it to overrule the District Court's Order and the Settlement Agreement it adopted is legally unsupportable. Such a legislative disregard of the discretion of an administrative agency, absent a change to the underlying law upon which that action was premised, a change not made in the 706 Rider, violates the Separation of Powers doctrine in the Constitution.

Here, the Forest Service asked the court to do exactly what this Court said cannot be done: allow Congress to interpret laws governing management of the National Forests by implementing them in exact and detailed commanded results. The 706 Rider impermissibly interferes with the

power of the Executive Branch. Congress has not changed any law; in the District Court, neither the Forest Service nor the Intervenors pointed to any law that the 706 Rider changed, either expressly or by any logical implication. Here, the 706 Rider did not change the law but merely set forth detailed results regardless of law for a specific part of one specific National Forest, in violation of the Constitution.

The decision below did not resolve the Constitutionality of such an act by Congress

Peitioners respectfully request that this Court grant our petition for a writ of certiorari to clarify this issue of federal law. The Court of Appeals did not address the question that is presented, but rather reached conclusions based on rules of law that are tangential to the current situation. As stated above, although this Court has clarified many aspects of the limitations imposed by the separation of powers doctrine, it has not set forth a rule by which to determine when Congress has impermissibly executed rather than legislated law. In this case, Congress crossed that line by compelling findings and results rather than changing law.

CONCLUSION

The BCA respectfully requests that the Supreme Court grant this petition and reverse the judgment of the Ten Circuit Court of Appeals.

Respectfully submitted,

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Dated: May 4, 2004

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-N-2173

BIODIVERSITY ASSOCIATES, et al.,

Plaintiffs,

v.

LYLE LAVERTY, et al.,

Defendants.

And

LARRY LAVERTY, Secretary of Agriculture for the State of South Dakota, et al.,

Intervenors/Defendants.

SETTLEMENT AGREEMENT

COME NOW plaintiffs, defendants and intervenors/defendants in the above-captioned action, "the parties" through counsel, and stipulate as follows:

1. Beaver Park Roadless Area

   a. The U.S.D.A., Forest Service ("Forest Service") agrees to withdraw the March 1, 1999 Record of Decision implementing the

selected alternative in the Veteran/Boulder EIS within the Beaver Park Roadless Area (Veteran Salvage Timber Sale). The location of the Beaver Park Roadless Area is shown on Exhibit A1 (Map from p. 75 Veteran Boulder EIS.)

b. Except as provided for in paragraph 5(a), the Forest Service shall not approve any decision to log, or construct or reconstruct vehicle routes, or construct or reconstruct skid trails, or otherwise undertake any activity involving the disturbance of soil or the cutting or damaging of trees, nor will it undertake sale "prep" work (e.g., tree marking), within the Beaver Park Roadless Area until after a decision by the Regional Forester to adopt the Phase II Forest Plan amendment (as defined in paragraph 9 below).

c. Except as provided for in paragraph 5(a), the Forest Service shall not approve any decision to log, or construct or reconstruct vehicle routes, or construct or reconstruct skid trails, or otherwise undertake any activity involving the disturbance of soil or the cutting or damaging of trees, nor will it undertake sale "prep" work (e.g., tree marking) within the Beaver Park Roadless Area until, pursuant to the Phase II Forest Plan amendment, it shall have:

    (i) fully analyzed and disclosed the impacts of the project proposal on the viability of the northern goshawk; and

    (ii) complied in full with the

requirements of the direction regarding the northern goshawk in the Forest Plan.

d. The Forest Service will prepare an EA/FONSI or an EIS for actions to reduce the potential threat of mountain pine beetles and related fire hazard in and around the Beaver Park Project Area, as defined in the Notice of Intent of November 11, 1999, 64 Fed. Reg. 61603, excluding the area defined in paragraph 4 (c)(vi), below. The NEPA documents shall not consider any proposal to undertake any project or activity otherwise prohibited by this Agreement.

2. **Northern Goshawk**

a. The Forest Service shall amend, with appropriate , public involvement, current management direction (including forest-wide standards and guidelines) for the northern goshawk to ensure compliance with requirements of the National Forest Management Act (NFMA), its implementing regulations and agency policy, and the Chief's appeal decision of October 12, 1999, through the Phase I and/or Phase II Forest Plan amendment(s).

3. **Management Indicator Species**

a. The Forest Service shall amend, with appropriate public involvement, current management direction to revise its protocol for the surveying, monitoring and evaluation of Management Indicator Species (MIS), in compliance with requirements of the NFMA,

its implementing regulations, agency policy, and the Chief's appeal decision of October 12, 1999.

b. The Forest Service shall:

(i) evaluate the viability of MIS within the planning area; this analysis may include monitoring data currently available and additional data as directed in the Forest Plan amendment; and,

(ii) establish specific goals and objectives for the management of MIS, sensitive species and/or their habitat.

c. Except as provided for in paragraph 5(a), prior to approving any project-level proposal to log, or construct or reconstruct vehicle routes, or construct or reconstruct skid trials, or otherwise undertake any activity involving the disturbance of soil or the cutting or damaging of trees within the Beaver Park Roadless Area, the Forest Service shall as required and consistent with the protocols and direction established in the Forest Plan pursuant to the Phase II Forest Plan amendment:

(i) conduct surveys and inventories for MIS;

(ii) fully analyze and disclose the impacts of the proposal on applicable MIS (if the proposal falls within the species' known or likely range); and

(iii) comply in full with requirements regarding surveying, monitoring and evaluation of MIS.

4. **Research Natural Areas (RNAs)**

a. The Forest Service shall complete an analysis of candidate areas for RNAs on the Black Hills National Forest. The Forest shall provide for appropriate public involvement prior to designating any NRAs. The RNA designation process shall be accomplished through the Phase II Forest Plan amendment.

b. Except as provided for in paragraph 5(a), the Forest Service shall not approve any decision to log, or construct or reconstruct vehicle routes, or construct or reconstruct skid trials, or otherwise undertake any activity involving the disturbance of soil or the cutting or damaging of trees, nor will it undertake sale "prep" work (e.g., tree marking) within the Beaver Park Roadless Area (as indicated in paragraph 1(a) above) or the areas listed in 4(c), below, until after a decision by the Regional Forester to adopt the Phase II Forest Plan amendment.

c. The Forest Service shall not approve or implement any decision concerning the following, until after a decision by the Regional Forester to adopt the Phase II Forest Plan amendment;

(i) The Goat Timber sale (13,800 ccf);

(ii) The timber harvest portion of the McIntosh Fen restoration project.

(iii) The Joker Unit (11,932 acres) of the Lakes timber sale;

(iv) The Strike timber sale (5,800 ccf);

(v) The Jimmy timber sale (6,000 ccf);

(vi) Any timber sale or road construction

or reconstruction in the area shown on attached map, Exhibit A2 excluding Units 17 and 29 of the Redhill Timber Sale.

d. Except as provided for in paragraph 5(a), prior to approving any project-level proposal to log, or construct or reconstruct vehicle routes, or construct or reconstruct skid trails, or otherwise undertake any activity involving the disturbance of soil or the cutting or damaging of trees within the Beaver Park Roadless Area or the areas listed in section 4.c, above, the Forest Service shall: (i) consider these areas for designation as RNAs, pursuant to the Phase II Forest Plan amendment; and (ii) comply in full with the requirements of the Phase II Forest Plan amendment regarding RNAs.

5. **Fire Management**

a. Notwithstanding any other provision of this agreement, any emergency wildfire suppression inside the Beaver Park Roadless Area shall be consistent with preserving the eligibility of the area for RNA designation and consistent with preserving the area's roadless character. Emergency wildfire suppression shall, to the maximum extent practicable, avoid using wheeled or tracked vehicles and employ methods of least possible disturbance, including aerial and light-hand techniques, expanding fire control boundaries to leave larger interior burn areas, and fireline rehabilitation. The Forest Service hereby agrees, and the parties concur, that any

ground-disturbing activities or other means of wildfire suppression inside the Beaver Park Roadless Area and the areas listed in 4(c) shall not disqualify the area for RNA eligibility and/or otherwise affect the determination of the area's wilderness capability, wilderness suitability, and/or roadless character.

b. The Forest Service agrees to develop a written pre-suppression plan for the Beaver Park Roadless Area and adjacent areas in consultation with interested parties. The pre-suppression plan will not involve pre-ignition ground disturbing or prescribed fire activities or the cutting or damaging of trees within the Beaver Park Roadless Area..

6. **"Sold timber sales"**

Table A: Sales Sold Under Revised Forest Plan

Sale Name	EA/EIS	Sale Volume (ccf)	Remaining
Beagle	Beagle	15,537	15,309
Blackhawk	Blackhawk	23,514	21,143
Coyote	Coyote	11,406	11,300
Crawford	Crawford	11,427	11,427
Cavern	Dalton/Piedmont	14,030	13,932
Piedmont	Dalton/Piedmont	4,493	4,425
Dumbuk	Dumbuk	16,964	15,970
Kirk	Kirk	21,244	19,382
Snapper	Snapper	16,667	16,667
Soholt	Soholt	10,994	10,878
Sundance	Sundance	8,192	5,518
Painter	Binford	13,763	13,763
Crooked Uncle	Crooked/Uncle	26,391	26,066

Lemming	Lemming	48,837	48,837
Total	ccf	243,459	234,617
	Mmbf	121.73	117.31

a. Plaintiffs agree to waive rights to challenge on any grounds except as provided in paragraphs 6(g), the authorization and implementation of timber sales listed in Table A, above, that have been sold on the Black Hills National Forest ("sold sales").

b. For purposes of this agreement, road "reconstruction" shall include:

(i) roadbed relocation;

(ii) roadbed widening;

(iii) upgrading an existing non-system or system road to a higher design standard;

(iv) route extension or lengthening; or

(v) removal of standing snags or green trees greater than approximately 6 inches DBH except that hazard trees (those that pose a safety risk associated with downfall) may be removed.

The parties agree that the limits on reconstruction in this paragraph can be modified by mutual agreement, such as relocation of roads in sales containing montane grasslands like the Lemming sale.

c. The Forest Service and timber sale purchasers agree there shall be no road construction and reconstruction, skid trail construction and use, and logging within a 30-acre area around

historic or active goshawk nest sites as identified in the individual sale maps (Attached as Exhibit B1) in all sales in Table A above, provided however, that use and maintenance of existing roads within 30 acre area around the nest site may continue.

d. The Forest Service and timber sale purchasers agree there shall be no road construction or reconstruction, skid trial construction or use, or logging in vegetation structural stages 4B, 4C, or 5 within ½ mile of historic or active goshawk nest sites as identified in the individual sale maps (Exhibit B1) in all of the sales in Table A above, provided however, that use and maintenance of existing roads within ½ mile of the nest site may continue.

e. In addition, the Forest Service and timber sale purchasers agree there shall be no road construction or reconstruction, skid trail construction or use, or logging within vegetation structural stage 5 that occurs in the cutting units in the sales in Table A above regardless of proximity to goshawk nests, provided however, that use and maintenance of existing roads may continue. Exhibit B1 depicts the overlap of structural stage 5 stands with cutting units.

f. The Forest Service agrees to prohibit logging in the future in the cutting units of the sale areas in which logging is prohibited in paragraphs 6c, d and e above, and the Forest Service agrees to prohibit construction and reconstruction of roads within ½ mile of goshawk nests in the sale areas in Table A,

until such time as:

(i) The Forest Service completes the Phase II Forest Plan amendment as described in paragraph 9 below; and

(ii) The Forest Service completes additional site-specific analysis pursuant to the Forest Plan as amended.

g. The timber sale purchasers agree to defer until September 1, 2000, or until successful resolution if earlier, any road construction or reconstruction, skid trail construction or use, or logging within specific portions of the Lemming, Crawford, Uncle and Sundance timber sales containing High Quality Montane Grasslands as indicated on site specific montane grassland maps (Attached as Exhibit B2). In the interim, the Forest Service and timber sale purchasers agree to use their best efforts to resolve any issues related to montane grasslands. Notwithstanding paragraph 6(a) above, Plaintiffs retain their rights to seek redress in Federal court for issues related to montane grasslands identified in Exhibit B2 for the Lemming, Crawford, Uncle and Sundance timber sales.

h. The Parties agree that the provisions of paragraph 6 of this agreement require modification of the contracts for the sales listed in Table A above, and that these modifications will reduce the volume of timber under contract. In order to resolve all legal disputes arising out of this litigation, and its settlement, the parties further agree that the

Black Hills National Forest (the Forest) shall attempt to identify and offer the purchaser of each sale listed in Table A replacement timber volume. If available, replacement timber volume will be identified in the sole discretion of the Forest Service and will be located within units analyzed in the NEPA documents and within the sale area where the modification deleted the volume. The replacement volume will be subject to all restrictions for sold sales in paragraph 6(b)-(e). The Forest will offer any replacement volume by the termination date of the contract. Any offer of replacement volume shall expire sixty(60) days, unless accepted. Acceptance of replacement volume shall constitute a release, waiver, and abandonment of all present and future claims against the United States, its political subdivisions, its officers, agents and employees arising out of or related to the replacement volume and/or modifications to the contract in Table A above necessitated by paragraph 6 of this Agreement. Each purchaser may elect to decline the offer of replacement timber volume and make a claim for the modifications necessitated by paragraph 6. Any such claims shall be submitted to the Contracting Officer and shall be processed under the Contract Disputes Act.

i. The Forest Service shall provide Contract Term Adjustment time for the sales in paragraph 6 delayed at the Forest Service's request during the settlement negotiations.

j. The Blackhawk timber sale is excepted from the provisions of Paragraph 6(b)-(h) and shall proceed as per the current contract.

7. **"Unsold timber sales"**

Table B: Sales Through Appeal Period Under Revised Forest Plan

Sale Name	EA/EIS	Original Volume (ccf)
Bigmac	Bigmac	3,000
Ward	Binford	12,000
Angle	Crooked/Uncle	3,000
Reddog/Slice	Reddog/Slice	11,000
Boulder	Veteran/Boulder EIS	9,200
Wish	Wish	10,000
Cub	Cub	13,2000
Roubaix	Roubaix	12,000
Rootbeer	Lemming	19,000
Redhill	Veteran/Boulder	16,000
Danno	Roubaix	8,000
Martin	Martin EA	5,400
Total	ccf	121,800
	Mmbf	60.9

a. Plaintiffs agree to waive their rights to challenge on any grounds, the authorization and implementation of timber sales listed in Table B, above, on the Black Hills National Forest ("unsold sales").

b. The Forest Service and timber sale purchasers agree there shall be no road construction, skid trail construction or use, or logging within ½

mile of historic or active goshawk nest sites as identified in the individual sale maps (Exhibit C) in all of the sales in Table B above, provided however, that use and maintenance of existing roads within ½ mile of the nest site may continue.

c. The Forest Service and timber sale purchasers agree there shall be no road construction or reconstruction, skid trail construction or use, or logging in vegetation structural stages 4C or 5 as identified in the individual sale maps (Exhibit C) throughout all of the cutting units in the timber sales listed in Table B above, provided however, that use and maintenance of existing roads may continue. Notwithstanding the provisions of this paragraph, the Forest Service may permit the logging of unit 20 of the Redhill timber sale, which contains structural stage 4C vegetation.

d. The Boubaix, Danno, Rootbeer, and Wish timber sales, the Forest Service shall protect and not cut the number and diameter ranges of green trees required by the environmental assessments. The Forest Service shall also protect and not cut an average of four additional green trees per acre, from the largest diameter class in each unit. If four trees per acre are not available in the largest class, the remaining trees will be selected in the next largest class and so on until four trees per acre are selected. This shall not necessarily result in the preservation of all of the largest trees in the unit. These trees shall be marked as "wildlife" trees. Such marking

may occur before or after the completion of the sales.

e. The Forest Service shall protect and not cut green trees meeting the diameter limits for the sales listed below. These trees shall be marked as "wildlife" trees. Such marking may occur before or after the completion of the sales.

(i) Cub Sale – equal to or greater than 20 inches DBH

(ii) Redhill Sale – equal to or greater than 19 inches DBH

(iii) Reddog/Slice, Angle, Martin Sales – equal to or greater than 17 inches DBH

(iv) Ward sale – equal to or greater than 16 inches DBH

f. The Boulder and Bigmac sales will not be subject to diameter limits or additional tree retention requirements other than those in paragraph 7b, c, g and respective NEPA documents.

g. The parties agree to maintain a 200 foot buffer in unsold sales listed in Table B above around known snail colonies of species of special concern as identified in Frest reports (1993, 2000 [draft]) as follows: Vertigo arthuri, Bertigo paradoxa, Catinella gelida, Dicus shimeki, Oreohelix strigosa cooperi, Oreohelix strigosa, and Oreonhelix strigosa berryi. See Maps attached as Exhibit C. No cutting, road construction, reconstruction, skidding, or prescribed burning shall be allowed within 200 feet of colonies of snail

species of special concern identified above, provided that road use and maintenance on existing roads can continue. Parties agree that the Forest Service may substitute other areas if needed to replace any volume lost from the 200-foot buffer prescription, provided that such replacement volume will be subject to all the other restrictions for unsold sales in paragraph 7. Any replacement volume will be located within units analyzed in the NEPA documents.

h. The Forest Service shall offer for sale as expeditiously as possible the unsold sales in Table B subject to the other requirements of paragraph 7. The unsold sales in Table B shall not be subject to the Phase I Forest Plan Amendment, given the interim resource protections imposed in this settlement agreement through the settlement and compromise of existing and potential legal claims affecting those sales. In particular, the Forest Service shall use its best efforts to sell the following sales on or before the dates indicated:

- Angle and Bigmac – November 1, 2000
- Martin and Ward – December 1, 2000
- Boulder and Redhill – February 1, 2001
- The remaining sales in Table B – September 30, 2001

i. Nothing in paragraph 7(h) shall preclude the Forest Service from exercising its discretion to offer new timber sales after completion of the Phase I Forest Plan Amendment.

j. The Forest Service agrees to prohibit logging,

road construction, road reconstruction, skidding, and prescribed burning in the future in the areas in which such activities are prohibited in paragraphs 7(b)-7(g) above, until such time as:

(i) The Forest Service completes the Phase II Forest Plan amendment as described in paragraph 9 below; an

(ii) The Forest Service completes additional site-specific analysis pursuant to the Forest Plan as amended.

k. Pursuant to Paragraph 4(c)(vi), above, the Forest Service shall not permit the logging of Units 18, 19, 21, 22, 23, 31, and 34 of the Redhill timber sale until such time as:

(i) The Forest Service completes the Phase II Forest Plan amendment as described in paragraph 9 below; and

(ii) The Forest Service completes additional site-specific analysis pursuant to the Forest Plan as amended.

8. Phase I Forest Plan Amendment

a. The Forest Service shall complete a Phase I Forest Plan amendment. The Phase I Forest Plan amendment shall address the Chief's interim direction contained in the October 12, 1999, decision in Appeal No. 97-13-00-0120. Phase I is anticipated to be completed by the Fall of 2000. Timber sales under the Revised Forest Plan, other than those listed in Tables A and B of this settlement agreement, that are sold after the Phase I amendment shall be

consistent with the Phase I amendment. The Phase I amendment will remain in effect only until adoption of the Phase II Forest Plan amendment and will be subsumed by it. The Regional Forester shall be the deciding officer for the Phase I Forest Plan amendment. Pursuant to 36 C.F.R. § 217.7(b)(2), the Chief will be the reviewing officer. The Chief shall issue a decision on any administrative appeal of the Phase I Forest Plan amendment within 160 days.

9. Phase II Forest Plan Amendment defined:

a. The Phase II Forest Plan amendment the Forest Service shall amend current management direction – including forest-wide standards and guidelines – with appropriate public involvement to ensure compliance with requirements of NFMA, its implementing regulations and agency policy, and all inadequacies identified in the Chief's appeal decision of October 12, 1999 for the remainder of the life of the Forest Plan Revision, except as otherwise amended pursuant to applicable law. Phase II shall address all of the issues identified in paragraphs 2, 3, and 4 of this settlement agreement, including northern goshawk, Management Indicator Species, and Research Natural Areas. Phase II is anticipated to be completed in 2002.

The Regional Forester shall be the deciding officer for the Phase II Forest Plan Amendment. Pursuant to 36 C.F.R. § 217.7(b)(2), the Chief will be the reviewing

officer. The Chief shall issue a decision on any administrative appeal of the Phase II Forest Plan amendment within 160 days.

10. Forest Development Road (FDR) 139.1

a. Plaintiffs agree to waive claims under the National Environmental Policy Act concerning Forest Service decisions to undertake the following activities:

(i) Maintenance (not reconstruction) on, or approval to conduct maintenance (not reconstruction) activities on existing road FDR 139.1 in sections 34 and 35 [Township 5 N, Range 5 E] to facilitate the City of Sturgis' access from I-90 to the Sturgis Reservoir property for the purpose of logging planned to begin in 2000 and concluding no later than August 31, 2001.

(ii) Approval of the use by the City of Sturgis or its contractors of FDR 139.1 to access the Sturgis Reservoir property for the purpose of logging planned to begin in 2000 and concluding no later than August 31, 2001.

Plaintiff's waiver is conditioned upon the State of South Dakota, and Meade County, South Dakota Signing this settlement and abiding by its conditions.

11. Dismissal of Case:

a. Upon final execution of this Settlement Agreement by the parties herein, Plaintiffs

agree to dismiss this case with prejudice. This Settlement Agreement shall apply to all named parties and signatories, in their individual and representative capacities.

12. No Admission of Liability:

a. The parties to this settlement stipulate and agree that this Settlement Agreement represents a compromise of a legal dispute, and by entering into this Settlement Agreement no party admits to any wrongdoing, nor admits that any party is or is not otherwise entitled by law, regulation, or policy to the actions agreed to in this Settlement Agreement.

b. The restrictions in this agreement, regarding, goshawks, snails, and especially diameter limits, are not binding precedent for the Phase I or II amendments or other timber sales not included in this settlement agreement. Nothing in this agreement shall be construed as an endorsement of the restrictions regarding goshawks, snails, and especially diameter limits. Nothing in this agreement shall be construed as an admission or endorsement that the restrictions or habitat protections established in this agreement are in any way adequate to protect – or maintain viable, well distributed populations or – northern goshawks, land snails, or other wildlife on the Black Hills National Forest.

c. Except as provided in paragraph 6(h), above, and except to enforce this agreement pursuant to paragraph 14(g) below, nothing in this settlement agreement will be construed as an

endorsement or acceptance of any factual assertion, legal or policy argument, or legal or policy position, or as precedent in any future litigation or negotiations with respect to any matter whatsoever. Nothing in this settlement agreement will be construed as a waiver of any legal position, legal argument, claim, or defense in any future lawsuit. Except to enforce this agreement pursuant to paragraph 14(g) below, neither this Settlement Agreement nor the dismissal of this action pursuant thereto shall be used in any other proceeding by way of claim or defense, or as evidence in support of any such claim or defense.

13. Attorneys Fees:

a. As a compromise for plaintiffs' claim for attorney's fees, the Forest Service shall pay attorney's fees and costs pursuant to the Equal Access to Justice Act, 29 U.S.C. § 2412(d)(1)(A) in the amount of $21,023,74, payable to Land & Water Fund of the Rockies, upon the furnishing to defendants' counsel of a letter signed by all named plaintiffs assigning their rights to said fees and costs to Land & Water Fund of the Rockies.

14. Other Provisions:

a. Plaintiffs and Intervenors, Black Hills Regional Multiple Use Coalition and Black Hills Forest Resource Association agree not to provide financial or any other support for any challenge to either this Settlement Agreement or to the timber sales which

plaintiffs have agreed not to challenge under this Settlement Agreement, provided, plaintiffs may give information that existed at the time the settlement is signed, and that is not subject to the confidentiality agreement for snails or goshawks, to third parties regarding the timber sales.

b. Nothing in this Settlement Agreement shall commit the federal government to expend funds not appropriated by Congress.

c. Nothing in this Settlement Agreement shall prohibit the federal government from promulgating or amending regulations, or from further amending the Black Hills Forest Plan.

d. The parties recognize that on-the-ground conditions may be different from the successional stages shown on the individual sale maps in the Exhibits. However, this agreement shall be interpreted and implemented based on successional stages shown on the individual sale maps attached to the Exhibits.

e. Nothing in this Settlement Agreement shall waive the State of South Dakota's sovereign immunity nor the immunity of its officers and officials.

f. The State of South Dakota, and the Counties of Lawrence, Meade, and Pennington, South Dakota, their officers, agents and employees expressly disclaim liability or responsibility of any kind for the performance or non-performance of actions under this agreement.

g. Notwithstanding the provisions of paragraphs

6(a), 7(a), and 11(a) of this agreement, Plaintiffs retain the right to enforce the terms of this agreement pursuant to the terms of this paragraph. In the event that there is a dispute between or among any of the parties to this Agreement with respect to the performance thereof, any party claiming non-performance or breach of this agreement shall provide written notice to all other parties of the claimed non-performance, following which notice the parties shall engage in good faith negotiations in an effort to resolve the dispute. If the parties are unable to resolve the dispute within 30 days, the parties reserve the right to petition this Court and a United States District Court Judge for the purpose of interpreting or enforcing the terms of this Agreement. The Court shall retain jurisdiction of this matter for the purpose of entering such further orders, directions, or relief as may be necessary or appropriate for the construction, implementation, or enforcement of this Agreement, except that disputes relating to paragraph 6(h) concerning contract issues shall be governed by the Contract Disputes Act, 41 U.S.C. 601 et seq.

h. Where acres and volume amounts are identified in any of the timber sale descriptions contained in this agreement, such amounts are approximations only, and do not account for reductions in volume that may result from restrictions imposed by this agreement, and this agreement shall not be construed as a warranty by the Forest Service

of the accuracy of said estimates.

i. This Agreement, and the rights and obligations created by it, shall expire and be of no further effect or validity upon the promulgation of the Phase II Forest Plan amendment, and upon the completion of any additional analysis required by this agreement, provided that those rights and obligations related to the individual timber sales in Tables A and B shall remain in effect until the respective timber sale is complete.

j. Exhibits B1, B2 and C are confidential and will be submitted to the Court under seal.

Date:_____
Edward B., Zukoski
Attorney for Plaintiffs

H.R. 4775

ONE HUNDRED SEVENTH CONGRESS
of the
UNITED STATES of AMERICA
AT THE SECOND SESSION
Begun and held at the City of Washington on Wednesday, the twenty-third day of January, two thousand and two

An Act

Making supplemental appropriations for further recovery from and response to terrorist attacks on the United States for the fiscal year ending September 30, 2002, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2002, and for other purposes, namely:

TITLE I—SUPPLEMENTAL APPROPRIATIONS

CHAPTER 1

DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

(INCLUDING TRANSFERS OF FUNDS)

For an additional amount for "Office of the Secretary", $18,000,000 to remain available until expended: Provided, That the Secretary shall transfer these funds to the Agricultural Research Service, the Animal and Plant Health Inspection Service, the Agricultural Marketing Service, and/or the Food Safety and Inspection Service: Provided further, That the entire amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, Provided further, That the entire amount small be available only to the extent an official budget request that included designation of the entire amount of the request as an emergency requirement as defined in the

Balanced Budget and Emergency Deficit Control Action of 1985, as amended, is transmitted by the President to the Congress.

AGRICULTURAL RESEARCH SRVICE
SALARIES AND EXPENSES

For an additional amount for "Salaries and Expenses", $8,000,000, to remain available until September 30, 2003: Provided, That the entire amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended: Provided further, That the entire amount shall be available only to the extent an official budget request that includes designation

H.R. 4775—45

SEC. 703. In fiscal year 2002 and thereafter, the Secretary of the Interior may charge reasonable fees for services provided at Midway Atoll National Wildlife Refuge, including fuel sales, and retain those fees, to the credited to the United States Fish and Wildlife Service, "Resource Management" account and remain available until expended for operation and maintenance of infrastructure and staffing required for non-refuge specific needs, including meeting the terms necessary for an airport operating certificate and the purchase of fuel supplies.

SEC. 704. The Department of the Interior and Related Agencies Appropriations Act, 2002 (Public Law 107-63), under the head "Minerals Management Service, Royalty and Offshore Minerals Management" is amended by striking the work "and" immediately following the word "points," in the sixth proviso, and by inserting immediately after the word "program" in the sixth proviso", or under its authority to transfer oil to the Strategic Petroleum Reserve,", and by inserting at the end of the sixth proviso immediately preceding the colon, the following, "and to recover MMS transportation costs, salaries and other administrative costs directly related to filling the Strategic Petroleum Reserve".

SEC. 705. In entering into agreements with foreign countries pursuant to the Wildfire Suppression Assistance

Act (42 U.S.C. 1856m) the Secretary of Agriculture and the Secretary of the Interior are authorized to enter into reciprocal agreements in which the individuals furnished under said agreements to provide wildfire services are considered, for purposes of tort liability, employees of the country receiving said services when the individuals are fighting fires. The Secretary of Agriculture or the Secretary of the Interior shall not enter into any agreement under this provision unless the foreign country (either directly or through its fire organization) agrees to assume any and all liability for the acts or omissions of American firefighters engaged in firefighting in a foreign county. When an agreement is reached for furnishing fire fighting services, the only remedies for acts or omissions committed while fighting fires shall be those provided under the laws of the host country and those remedies shall be the exclusive remedies for any claim arising out of fighting fires in a foreign country. Neither the sending country nor any organization associated with the firefighter shall be subject to any action whatsoever pertaining to or arising out of fighting fires.

SEC. 706(a) FINDINGS.—Congress finds that—

(1) forest health conditions within the Beaver Park Area and the Norbeck Wildlife Preserve within the Black Hills National Forest are deteriorating and immediate action to treat these areas is in the public interest;

(2) the existing settlement agreement in Biodiversity Associates v. Laverty, Civil Action No. 99-N-2173, filed in the United States District of Colorado on September 12, 2000, (referred to in this Act as the "Settlement") prevents timely action to reduce the risk of wildfire in the Beaver Park Roadless Area;

(3) pending litigation (Sierra Club v. U.S. Forest Service, Civ. No. 94-D-2273 (D. Colorado))

prevents timely action to reduce the risk of wildfire in the Norbeck Wildlife Preserve;

(4) existing administrative and legal processes cannot address the fire danger in time to enable the Secretary of Agriculture to take action to reduce the danger;

(5) immediate action to address the fire danger in an environmentally responsive manner is supported by the State, local counties, local industry users, and some environmental groups;

(6) the addition of 3,600 acres to the Black Elk Wilderness in the Black Hills National Forest is in the public interest;

(7) the State of South Dakota, Lawrence, Meade and Pennington County fire officials are encouraged to identify "fire-safe building standards) that may be needed to end these moratoria; and

(8) the State of South Dakota is encouraged to take actions as necessary to create a defensible fuel zone within State lands south and southwest of Sturgis.

(b) PURPOSES—The purposes of this section are—

(1) to authorize and direct the Secretary of Agriculture (in this section referred to as the "Secretary") to undertake actions to address promptly the risk of fire and insect infestation; and

(2) to designate an addition to the existing Black Elk Wilderness Area in the Black Hills National Forest;

(c) FIRE AND BETTLE RISK REDUCTION IN EXISING TIMBER SALE ANALYSIS AREAS—

(1) IN GENERAL.—Subject to paragraph (2), the Secretary is authorized to treat additional timber within or outside the existing cutting units for the Piedmont, Kirk, Redhill, Cavern, Deadman, Danno and Vanocker timber sales and within the analysis areas for these sales as is necessary to reduce beetle infestation and fire hazard;

(2) CRITERIA.—In implementing additional treatments within the timber sale analysis areas referred to in paragraph (1), the Secretary shall use in order of priority the following criteria:

(A) Areas within ¼ mile of private properties where private property owners have taken or are taking actions to treat their lands.

(B) Stands that are a fire hazard or insect infested, and are near private lands or in proximity to communities.

(C) Areas that have the highest intensive or concentration of insect infestation that will move to other areas.

(D) Stands that are a fire hazard or insect infested, and are near areas of high resource value where retaining green trees is important, such as goshawk nests, sensitive landscapes, recreation areas, and developments.

(E) Stands that are a high fire hazard or insect infested, and are within skidding distance of existing roads.

(F) Concentrations of insect infested trees.

(G) Stands with the highest density that are most susceptible to insect attack and are in close proximity to infested trees.

(3) ADDITIONAL CRITERIA.—In carrying out this subsection, the Secretary shall ensure that—

(A) any additional treatment for the Cavern, Kirk, and Piedmont sales shall comply with provisions 6c, d and e of the Settlement;

(B) any additional treatment for the Deadman and Vanocker sales, shall be consistent with the Black Hills Forest Plan, including the "Phase I Amendment"; and

(C) any additional treatment for the Redhill and Danno sales shall comply with the provisions of 7b, c, and g of the Settlement.

(4) SKID TRAILS.—Notwithstanding the Settlement, the Secretary may authorize access by skid trails to the additional treatment areas referred to in this subsection to remove or treat infested stands, except that the skid trials otherwise restricted by the settlement shall be restored to pre-existing conditions upon completion of treatment activities.

(5) COMPLETION OF TREAMENT ACTIVITIES.—The Secretary shall request timber purchasers to give priority to completing treatment within the Piedmont, Kirk, Redhill, Cavern, Deadman, Danno, and Vanocker timber sale areas to address fire issues and beetle outbreaks.

(d) OTHER TREATMENTS.—

(1) BUFFER ZONES.—The Secretary is authorized to reduce risk to private property adjoining the Black Hills National Forest by treating insect infested trees, dead trees, and downed woody materials on National Forest System lands in T5N, R5E, BHM, Section 35, and T4N, R5E, BHM, Sections 1, 2, and 12 within 200 feet of adjacent private property. The treatments shall comply with the goshawk nest protections and snail protections in provisions 6c and 7g of the Settlement.

(2) ADDITIONAL TREATMENTS.—The Secretary is authorized to treat for insects and fuel reduction National Forest System lands within ¼ mile of the private property and other non-National Forest System lands near the community of Sturgis, and shall include, where feasible, the following locations:

(A) in T5N, R5E, BHM within 1.4 mile of the exterior boundary of the Black Hills National Forest in—

(i) Section 35;
(ii) Section 27;
(iii) Section 21;
(iv) Section 20; and

(v) Section 18.

(B) in T5N, R4E, BHM–

(i) Section 13;

(ii) Section 11;

(iii) Section 2;

(iv) Section 3; and

(v) Section 4.

(3) FUEL BREAKS–The Secretary shall establish 400-foot fuel breaks as depicted on the map entitled "Beaver Park Fuel Breaks and Fuel Treatment Areas," dated June 11, 2002. In establishing the fuel breaks, the Secretary–

(A) shall not enter any 30-acre area around historic or active goshawk nest sites identified in Exhibit B1 of the Settlement; and

(B) shall use best efforts to retain the largest green trees and large snags.

(4) LIMITATION–Treatment actions outside of the Beaver Park Roadless Area authorized by subsection (c) and subsection (d)(a), (2), and (3) shall be limited to no more than 8,000 acres of National Forest System land, pending the issuance of a decision on the proposed Elk Bugs and Fuel project.

(5) FORBES GULCH–To reduce concentrated heavy fuels, the Secretary is authorized to treat not more than 700 acres within the area identified as Forbes Gulch on the map referred to in paragraph (3). Such treatments shall not involve commercial timber sales or road construction, except that the Secretary may permit firewood cutters to remove the timber without construction on any roads. In carrying out the treatments authorized by this paragraph, the Secretary–

(A) may use the Forbes Gulch unclassified road for motorized equipment and vehicles to facilitate ingress and egress of equipment and personnel and may maintain this road to minimum

standards necessary for safety and resource protection;

(B) may utilize helicopters to fly in heavy equipment (such as industrial chippers and small tractors) to assist with the project.

(C) shall use best efforts to retain the largest green trees and large snags;

(D) may construct two 10-acre safety zones; and

(E) shall reduce the stand structure to no less than 40 square feet basal area per acre of live trees, if available.

(e) FIRE SUPPRESSION ACCESS IN THE BEAVER PARK ROADLESS AREA.—

(1) PRE-SUPPRESSION PLAN.—The pre-suppression plan for the Beaver Park Roadless Area provided for in the Settlement may provide for actions authorized by this section, and shall be completed as soon as practicable.

(2) IMPROVED ACCESS.—The Secretary is authorized to provide for improved fire equipment access at the perimeter of the Beaver Park Roadless Area by improving classified Forest Roads 139.1, 169.b, 169.1d, and 1391b. Such improvements shall be the minimum necessary for crews, equipment, and single axle wildfire trucks and may include removing selected trees along roads, constructing pull-outs and turn-arounds, smoothing road surfaces in rough spots, and straightening some corners.

(3) FORBES GULCH UNCLASSIFIED ROAD.—To protect public safety and reduce fire risks, the Secretary shall prohibit public access year-long on the Forbes Gulch unclassified road. The Secretary shall conduct a roads analysis process as provided in Forest Service Manual 7710 and the necessary level of analysis and documentation pursuant to the National Environmental Policy Act of

1969 (42 U.S.C. 4321-4347)(in this section referred to as "NEPA") before making a decision to open to public motor vehicle use the Forbes Gulch unclassified road identified on the map entitled " Beaver Park Fuel Breaks and identified on the map entitled "Beaver Park Fuel Breaks and Fuel Treatment Areas," dated June 11, 2002. Except as provided in subsection (d)(5) and until a decision is issued, the Secretary shall not maintain the Forbes Gulch unclassified road and shall prohibit public access on the road.

(4) HELISPOTS.—If sufficient openings for helispots are not available in the Beaver Park Roadless Area, the Secretary is authorized to construct two 5-acre helispots within the Area to transport firefighters and fire equipment into and out of the area.

(5) EASEMENTS.—To facilitate firefighter access into, and escape routes from, Beaver Park Roadless Area, the Secretary shall attempt to acquire easements from the exterior Forest Service boundary to I-90 on the eastern side of Beaver Park Roadless Area, at a minimum, along Gilford Gulch, Forbes Gulch, Pleasant Valley and Bulldog Gulch.

(f) NEEDLES TIMBER SALE AREA.—

(1) NEEDLESS TIMBER SALE.—The Needles Timber Sale shall proceed after the Secretary makes modifications in implementation of the Decision Notice to further benefit game animals and birds, as reflected in the memorandum known as the "Burns/Carter" memorandum dated November 10, 1999, and maintained in the Black Hills National Forest Supervisor's office. The standards to which any road is constructed for the timber sale shall be the minimum necessary to access and remove timber.

(2) RESEARCH COMMITTEE—By December 1, 2003, the Secretary shall select a

committee composed of research scientists who are federal employees to recommend an old growth research area within the Needles area (outside the Needles Timber Sale cutting units). By December 1, 2004, the committee shall make its recommendation to the Secretary. The committee's recommendation shall be subject to public notice, review and comment.

(g) GRIZZLY TIMBER SALE.—The Grizzly Timber Sale shall proceed after the Secretary makes modifications in implementation of the Decision Notice to further benefit game animals and birds, as reflected in the memorandum known as the "Burns/Carter memorandum" dated November 10, 1999, and maintained in the Black Hills National Forest Supervisor's office. The standards to which any road is constructed for the timber sale shall be the minimum necessary to access and remove timber.

(h) NORBECK.—The Secretary is authorized to use the full spectrum of management tools including prescribed fire and silvicultural treatments to benefit game animal and bird habitat in meeting the purposes of the Norbeck Wildlife Preserve direction contained in the 1997 Revised Forest Plan and future plan amendments and revisions. The basis of the MOU will be the guidelines set forth in the May 21, 2002 m3emo by SDF&P.

(i) NORBECT MEMORANDUM OF UNDERSTANDING.—By December 1, 2003, the Secretary shall propose a Memorandum of Understanding with the South Dakota Department of Game, Fish and Parks to, at a minimum, adopt procedures to monitor the effects of management activities, consult on habitat management, concur on program areas of responsibility, and review and recommend as needed any changes to Norbeck Wildlife Preserve direction contained in the 1997

Revised Forest Plan and future plan amendments and revisions. The basis of the MOU will be the guidelines set forth in the Mary 21, 2002 memo by SDF&P.

(j) PROCESS.–Due to extraordinary circumstances present here, actions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law including, but not limit to, NEPA and the National Forest Management Act (16 U.S.C. 1601 et seq.). Such actions shall also not be subject to the notice, comment, and appeal requirements of the Appeals Reform Act, (16 U.S.C. 1612 (note), Pub. Law. No. 102-391 sec. 322). Any action authorized by this section shall not be subject to judicial review by any court of the United States. Except as provided by this section the Settlement remains in full force and effect.

(k) EFFECT OF ACTIONS.–Except for those actions required by subsections (f)(1) and (g), the Secretary shall disclose the effect of actions authorized by this section in the proposed Elk Bugs and Fuels project cumulative effects analysis for past, present, and reasonably foreseeable future actions. The decision for the Elk Bugs and Fuels project shall be issued not later than July 1, 2003.

(l) RESEARCH NATUAL AREA.–Except as provided in this section, the Secretary shall undertake no additional ground disturbing or vegetation removal activities within the Beaver Park Roadless Area until completion of the Phase II amendment to the Black Hills National Forest plan. The Secretary shall analyze the Beaver Park Roadless Area for suitability as a Research Natural Area, as required by the Settlement. The Secretary shall not consider any of the actions authorized or required by this section to affect the

suitability of the Beaver Park Roadless Area for designation as a Research Natural Area.

(m) ROADLESS CHARACTER.—The actions authorized by this section will not affect the determination of the Beaver Park Roadless Area's wilderness capability wilderness suitability, and/or roadless character.

(n) WILDERNESS DESIGNATION.—Section 103 of Public Law 96-560 is amended by—

(1) inserting "(1)" after "National Wilderness Preservation System:"; and

(2) adding before ":Provided, That" the following: "; and (2) certain lands in the Black Hills National Forest, South Dakota, which comprise approximately three thousand six hundred acres, as generally depicted on a map entitled 'Black Elk Wilderness".

(o) REPORTING.—The Secretary shall report to the Congress on the implementation of this section on or by November 30, 2002, June 30, 2003, and November 30, 2003.

CHAPTER 8

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

SALARIES AND EXPENSES

Of the funds provided under this heading in Public Law 107-116 for Occupational Safety and Health Administration training grants, not less than $3,200,000 shall be used to extend funding for the Institutional Competency Building training grants which commended in September 2000, for program activates for the period of September 30, 2002, to September 30, 2003, provided that a grantee has demonstrated satisfactory performance.

H.R. 4775-106

This Act may be cited as the "2002 Supplemental Appropriation Act for Further Recovery From and Response to Terrorist Attacks on the United States".

Speaker of the House of Representatives

Vice President of the United States and

President of the Senate.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORDO

Civil Action No. 99-N-2173

BIODIVERSITY ASSOCIATES, SIERRA CLUB, THE WILDERNESS SOCIETY, BRAIN BRADEMEYER,

Plaintiffs,

vs.

LYLE K. LAVERTY, in his official capacity as Regional Forester of the Rocky Mountain Region of the U.S. Forest Service, MICHAEL DOMBECK, in his official capacity as Chief of the U.S. Forest Service, JOHN C. TWISS, in his official capacity as Supervisor of the Black Hills National Forest, and the U.S. Forest Service,

Defendants.

And

DARRELL CRUEA, in his official capacity as Secretary of the South Dakota Department of Agriculture; BLACK HILLS REGIONAL MULTIPLE USE COALITION; BLACK HILLS FOREST RESOURCE ASSOCIATION; and LAWRENCE COUNTY, MEADE COUNTY and PENNINGTON COUNTY, all Political Subdivisions of the State of South Dakota,

Intervenor Defendants.

REPORTER'S TRANSCRIPT
MOTION HEARING

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM, Judge, United States District Court for the District of Colorado, commencing at 9:31 a.m., on the 26th day of November, 2002, in Courtroom 14, United States Courthouse, Denver, Colorado.

THERESE LINDBLOM, official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

APPEARANCES

For the Plaintiffs
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PROCEEDINGS

COURTROOM DEPUTY: It's been suggested perhaps I should try to hang up and call again.

THE COURT: What is that?

COURTROOM DEPUTY: Mr. Novak is appearing over the phone.

THE COURT: What's the rifle fire in the background?

COURTROOM DEPUTY: I'm not sure, Your Honor. We dialed in, and we have this coming through, so he's not hearing on his end. We could try dialing him again.

THE COURT: Can you hear sir?

MR. NOVAK: Your Honor, I can hear you, but I can't hear – I heard faintly someone else in the background.

THE COURT: That's because they're not in front of the microphone. If you can hear me, you can hear anybody in front of a microphone.

MR. NOVAK: Your Honor, I am hearing clicking. I'm assuming that's louder on your end than it is on mine.

THE COURT: Right, it's loud. Welcome to the world of high technology.

Let's go forward on this connection. I mean, the clicking, I guess, is minor compared to what the other possibilities are.

Case 99-N-2173, Biodiversity v. Laverty. I've forgotten the current name, Collins, I guess.

I'll take the appearance of counsel.

MR. NOVAK: Your Honor, Steve Novak for plaintiff, BDA and Brademeyer.

MR. TRASKOS: Kevin Traskos, Assistant United States Attorney for the federal defendants.

Charles McGuigan, Assistant Attorney General for the State of South Dakota.

Carol Jeffrey, associate with the law firm of Horowitz & Wake, appearing on behalf of Defendant Intervenors Black Hills Regional Multiple Use Coalition and Black Hills Forest Resource Association.

MR. TRASKOS: And, Your Honor, I have with me at counsel table today Michael Hegarty from the U.S. Attorney's Office and Steve Silverman from the Forest Service.

THE COURT: All right. The matter is here for a hearing on the motion for temporary restraining order and preliminary injunction.

Mr. Novak do you wish to argue?

MR. NOVAK: Well, Your Honor, I'm a little – I'm just curious, briefly, if – what it is you'd like me to argue, if you'd like me to argue the temporary restraining order arguments or if you'd like me to argue for – in response to the Government's brief that they filed in response to our reply originally.

I remember when I was back there, you were concerned with some of the issues they brought up, and for that reason you had allowed us brief time to try to make a response about.

THE COURT: Well, I've received your response, and I've reviewed your response.

As far as I'm concerned, everything is before the Court, including the motion to enforce the settlement agreement, the motion for a temporary restraining order and preliminary injunction. And if you wish to make argument, you may do so.

MR. NOVAK: Well, Your Honor, to begin with, on our – our motion for temporary restraining order was largely filed to preserve the status quo. And I think if and when you decide to rule on our underlying motion, the TRO and preliminary injunction will be unnecessary.

But I think what I would like to argue night now is the – argue more on the merits of our claim on the underlying position on specifically the issue of whether or not the Section 706 Rider does modify or alter the law underlying the basis for the settlement agreement. And if it does, then I think the matter is purely constitutional. If it does not, I think the rider is purely unconstitutional and would not be applicable to this case.

THE COURT: All right. Go ahead.

MR. NOVAK: Your Honor, we have pointed out to you a number of cases, including the *Seattle Audubon* case and the *Plaut* case. I think both of these cases stand pretty clearly for the proposition that Congress can do a lot of things. It can even affect judgments of the courts, but what it must do is it must amend or change or create new underlying law which then by its incorporation and by the Court's interpretation of the operation of the changes or amendments to the law would then affect the way the Court was either ruling or court deciding the issue for it.

What we submit is that rather than – rather than altering or amending any underlying law, the effect of the 706 Rider is simply to substitute Congress' judgment for the Court's judgment. It basically places what Congress wants in the terms of the Court order and not give the Court any ability to decide or to interpret what Congress' mandate was,

thereby, basically nullifying any effects that this court has – this or any other court must have.

And we think that that is – is an impermissible exercise of legislative authority. It infringes greatly upon the judicial branch.

And we think that this is a – this is a bad precedent to set, to allow Congress to not only modify underlying law to affect the judgment, but then take their prerogative to limit judicial review. So, in effect, they basically cancel out any judicial review. So, in effect, they basically cancel out any effect that the judicial branch might have by doing so when you. -- when you lump the two things that they try to do, limit judicial review and mandate specific and pending or decided legislation, I don't know how that can be –

THE COURT: Are you still there sir?

MR. NOVAK: Yes, Your Honor.

THE COURT: I didn't know.

MR. NOVAK: I was just pausing. I apologize for not being able to be there in person in front of you on a television screen.

THE COURT: All right.

MR. NOVAK: We would also submit, Your Honor, that the *Miller v. Prince* case that is in the Government's response, all it does is simply reaffirm the standards set out in *Plaut* and *Seattle Audubon*, namely, that the Congress can and always has been able to amend underlying law, amend law, create law, change new law, and even through its operation affect cases on going in court.

However, the proposition that the Government asserts it for, that basically the only judgment – the only reason that a Court can continue to exercise jurisdiction if the case is involving money and not respective relief or perspective injunctive relief, we would find that is not – we would submit that is not a proper reading.

Congress is free to change law, and then the courts are free to interpret what affect that law has on the litigation either before it or already decided by it. But Congress can't simply step in and mandate that a Court find X, Y, Z, find as

in the 706 Rider that the specific prescription lifted in that 706 Rider must be carried out. That is not the kind of thing we've seen either in the *Wheeling Bridge* case or *Miller v. French* case.

I would ask Your Honor if – if you are inclined to agree with the Government's reasoning in their response brief in relation to *Miller v. French*, if you would have any questions of our position on that.

THE COURT: No. I think you've undertaken a valiant effort. Regardless of whether I agree with you, I think I understand the issues.

Anything further?

MR. NOVAK: Briefly, Your Honor. I think if you – if you look at our reply brief, I think some of the issues raised in here – I think we distinguished the subject matter of *Miller v. French* – did basically – it set up – it was a fairly convoluted set of facts, but it basically allowed a stay of a stay to operate automatically, and that was the – the gist of the unconstitutional claim, that prisoners felt that that automatic stay of stay of action was an impermissible infringement on the Executive Branch.

And we would submit that this is a wholly different animal than what you see in *Miller v. French*, the cases – the facts that are set out in the 706 Rider. And we think that case is fairly easily distinguishable.

As well as the *Wheeling Bridge* case. The *Wheeling Bridge* case, there it was pretty clear, Congress changed underlying law. They said basically the bridge is now – that is a legal structure. And the injunction the Court had previously issued saying that the bridge had to be torn down or razed was basically altered by the fact that Congress changed what the definition of a navigable structure was, and that changed the way the Court had to look at the case.

Similarly here, if Congress had gone in and said NEPA now consists of this, this and this, and National Forest Management Act now applies to Black Hills National Forest in a different way, then clearly that would have been an amendment or a change to law.

And I've looked at the Administrative Procedures Act. There is nothing as of the last time I filed this brief that mentioned the Black Hills National Forest specifically as being exempt from litigation under the Administrative Procedures Act or the National Environmental Policy Act. And I think that the only clear amendment of law in the 706 Rider was the amendment to the wilderness act. I think that's a clear amendment. And, obviously, the Government would have you read or infer a change in the underlying law based on the – just the framework of it, in a similar – similar inference as *Ford* and *Audubon* took. We would submit that is not the – the proper reading for this case.

Unless you have any questions, I think that's alternate the specific argument I have right now.

THE COURT: All right. The Court does not require argument from the defendants.

The matter before the Court, as plaintiff's counsel correctly points out, are probably not the temporary restraining order, because although it technically remains pending. The Court, in effect, with the consent of at least the federal defendants, granted that relief at the last hearing. So before the Court now are the motion for preliminary injunction and the motion to enforce the settlement agreement.

This is a case where the Court believes that, in the effect, the hearing on the motion for a preliminary injunction can be consolidated with the trial on the merits. The facts are not in dispute, and the Court can determine this matter or this case as a matter of law. And therefore, I'm going to address only one prong of the preliminary injunction standard, and this is whether there is a reasonable probability of success on the merits.

I'm going to do that because that, of course, gets – gets us into the question of whether the motion to enforce the settlement agreement is well taken.

Initially, the Court needs to decide whether it has jurisdiction to consider the motion to enforce the settlement agreement.

The defendants argue that the Court lacks jurisdiction to enjoin actions taken pursuant to Section 706 because Section 706 explicitly provides that actions authorized by the section are not subject to judicial review.

It is well established that Congress can withdraw the Court's review of action taken under a statute. On the other hand, Congress cannot prohibit review of the constitutionality of the statute itself.

In this case the motion to enforce the settlement agreement, in effect, asks the Court to determine the constitutionally of Section 706. It does not ask the Court to review the particular acts authorized under it.

Plaintiff's arguments are therefore constitutional in nature, their main argument being that Section 706 violates the separation of powers doctrine.

I therefore conclude that this is a case in which the plaintiffs seek review of the constitutionality of the statue. And therefore, it is by view that I have jurisdiction of – over the case.

The argument on the merits raises the issue of whether Section 706 violates the separation of powers doctrine. Plaintiff's argue that it does. They rely, first, on *Plaut v. Spendthrift Farm, Incorporated.*

The Court has reviewed the argument and the case of *Plaut v. Sprindthrift Farm*. I do not believe that *Plaut* governs this case. First, as the defendants argue, *Miller v. French* expressly distinguishes *Plaut*, and it distinguishes in a way that takes *Plaut* outside of the issues, or makes *Plaut* beside the point on the issues that are before this Court.

This court granted no monetary relief, nor did it enter a judgment which was final. The Court did nothing more that approve a settlement agreement, and it's an executory settlement agreement. The settlement agreement itself provided that it could be changed. There is a clause in the settlement agreement that says, nothing in the agreement shall prohibit the federal government from further amending the Black Hills Forest Plan.

The fact that this is a settlement agreement also serves to distinguish this case from *Plaut*. This case doesn't even rise to the level where the Court executed a consent decree. This is a case where the parties sat down among themselves and settled the case. The more proper analogy here is to an executory settlement contract. It is true that the Court approved the settlement agreement, but that is different from a consent decree.

In the past, the Court has refused to approve settlement agreements precisely because of the issues raised in this case. I acknowledge that I did it in this case.

The Court was unfamiliar with the parameters of the settlement agreement. The Court was not asked to review the settlement agreement to determine whether it was in the public interest. The Court was given no standards by which to review the settlement agreement. And as far as I'm concerned, the Court's approval of the settlement agreement is entitled to very, very little weight, because it was negotiated amount the parties. In contrast to cases where the Court does approve agreements such as class actions, there are no standards by which the Court is governed in approving these settlement agreements.

So I – it's my finding that separate and apart from the *Miller v. French* case, the nature of this judgment is such that it is more properly treated as a contract between the parties and not as a court decree.

And construed as a contract, it was expressly subject to modification, and Congress has done nothing more than modify that agreement.

The plaintiffs rely on *Robinson v. Seattle Audubon Society*. And the question is – and this comes up at other points in the argument – whether this is a change in law or whether Congress has directed this court in a certain interpretation of the existing law.

In Seattle – in *Robinson v. Seattle Audubon*, it's worth noting that the Supreme Court upheld the provision that was in issue, which was a part of the Northwest Timber Compromise. It applied to 13 national forests in Oregon and

Washington. It mandated that harvesting take place in expanded harvesting restrictions.

A particular section of the Act said that, Congress hereby determines and directs that management of the forests, according to other subsections, is adequate consideration for the purpose of meeting statutory requirements that are the basis for the consolidated cases.

The Supreme Court upheld that provision, because it compelled changes in law, it did not compel findings or results under old law.

The Court found that nothing in the applicable section compelled particular findings of fact or applications of law to facts.

The Court also noted that as between two possible interpretations of the statue, one of which would render the statute unconstitutional and the other valid, the Court's duty is to adopt the view that will save the statue.

I agree with the defendants that Section 706 does not compel particular findings under NEPA, the National Forest Management Act or any other law, but merely provides that those statutes are not applicable.

Section 706(j) says, Due to extraordinary circumstances present here, actions authorized by this section shall proceed immediately and to completion, notwithstanding any other provision of law, including but not limited to NEPA and the National Forest Management Act.

It is clear to the Court that that is simply Congress carving out in one section, namely, Section 706(j), an exception to preexisting legislation.

I therefore believe this case is analogous to *Seattle Audubon*, because Section 706 does not compel particular findings, but, rather, amends the law in question.

In other words, it's – Section 706 does not compel particular findings, but, rather, amends the law in question.

In other words, its – Section 706 changed the law which applies to this particular national forest. It did not – it does not compel findings and actions under old law, as the plaintiffs contend.

And, finally, as I indicated at the last hearing, I believe the strongest argument is the one that the federal defendants finally got around to raising in their submission the day before the last hearing, and that is the argument that relies on *Miller v. French*. I've reviewed the plaintiff's reply brief. The plaintiffs have, as I said during colloquy, made a valiant effort to distinguish *Miller v. French*. I am not persuaded. I think that in part the plaintiffs misread *Miller v. French*, but the Court sees no persuasive basis for distinguishing this case from *Miller*.

Once again, the – part of the argument being made is that Congress has mandated results and not changed existing law. I've already indicated that I disagree with that. I disagree with it in the context of *Seattle v. Audubon*. I disagree with it in the context of *Miller v. French*.

The District Court decisions which distinguish *Miller v. French* are not persuasive to me because plaintiffs don't relate those cases to this case in terms of the facts in any way.

So the Court sees no unconstitutional infirmity in Section 706, either on the ground that it mandates particular results or that it otherwise operates as a violation of the separation of powers.

Accordingly, the motion for preliminary injunction within which the temporary – motion for temporary restraining order is subsumed, that's No. 66, is denied.

It is the Court's view that the motion to enforce the settlement agreement must also be denied. And I believe that constitutes a final ruling which I think will enable the parties to seek further review, if that's what they want to do.

Is there anything else that is pending, Mr. Novak?

MR. NOVAK: No, Your Honor.

THE COURT: All right. I'm not sure how – I don't think a final judgment is needed. I think an order of refusing to enforce the settlement agreement is all that we need at this point.

Do the federal defendants have any different view?

MR. TRASKOS: No, we believe you're correct, Your Honor.

THE COURT: All right. The Court is in recess.

MR. NOVAK: Thank you, Your Honor.

(Hearing concluded at 9:59 a.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 5th day of December, 2002.

Therese Lindblom, CSR, RMR, CRR

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BIODIVERSITY ASSOCIATES and BRIAN BRADEMEYER,

Plaintiffs-Appellants

SIERRA CLUB and THE WILDERNESS SOCIETY,

Plaintiffs,

v.

No. 03-1002

RICK D. CABLES, in his official capacity as Regional forester of the Rocky Mountain Region of the U.S. Forest Service; DALE N. BOSWORTH, in his official capacity as Chief of the U.S. Forest Service; JOHN C. TWISS, in his official capacity as Supervisor of the Black Hills National Forest; U.S. FOREST SERVICE,

Defendants-Appellees,

LARRY GABRIEL, in his official Capacity as Secretary of the South Dakota Department of Agriculture; BLACK HILLS REGIONAL MULTIPLE USE COALITION; BLACK HILLS FOREST RESOURCE

ASSOCIATION; MEADE COUNTY, LAWRENCE COUNTY, and PENNINGTON COUNTY, all political Subdivisions of the State of South Dakota,*

Defendants-Intervenors-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 99-N-2173)

Ray Vaughan of WildLaw, Montgomery, Alabama (Steve Novak of WildLaw, Asheville, North Carolina, with him on the briefs), for Plaintiffs-Appellants.

Kevin Traskos, Assistant United States Attorney (John W. Suthers, United States Attorney, with him on the brief), Denver, Colorado, for Defendants-Appellees.

Diane Best, Assistant Attorney General (Lawrence E. Long, Attorney General; Charles D. McGuigan, Assistant Attorney General, with her on the brief), State of South Dakota, Pierre, South Dakota, for Defendants-Intervenors-Appellees.

Before **MURPHY**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **McCONNELL**, Circuit Judge.

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* Mr. Cables, Mr. Bosworth and Mr. Gabriel, who are the successors in office of Kyle K. Laverty, Michael Dombeck and Darrell Cruea, respectively, have been substituted as parties pursuant to Fed. R. App. 34(c)(2).

McCONNELL, Circuit Judge.

For many years, Congress has been unable to come to agreement on nationwide legislation to address the dangers of insect infestation and fire in the national forests. In 2002, however, in a rider to a supplemental appropriations act for the war on terrorism, Congress passed legislation applicable to selected sections of the Black Hills National Forest in South Dakota and nowhere else, permitting logging and other clearance measures as a means of averting forest fires. The legislation specifies forest management techniques for these lands in minute detail, overrides otherwise applicable environmental laws and attendant administrative review procedures, and explicitly supercedes a settlement agreement between the Forest Service and various environmental groups regarding management of these lands.

The question presented is whether the extraordinary specificity of this legislation, coupled with its displacement of a settlement agreement, amounts to congressional violation of the Constitution's separation of powers, by invading the province of the executive branch, the judicial branch, or both. We hold that it does not. Article IV, § 3, cl. 2 expressly grants Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." With respect to this power – like most of its enumerated powers – Congress is permitted to be as specific as it deems appropriate. Moreover, settlement agreements between private litigants and the executive branch cannot divest Congress of its constitutionally vested authority to legislate.

BACKGROUND

The first law involved in this case is the law of unintended consequences. Fire suppression efforts

conducted over more than a century in large parts of the West have had the unintended effect of transforming forests from savannah-like grasslands studded with well-spaced large, old, fire-resistant trees, into thicker, denser forests.[1] Prior to the arrival of Europeans, these forests experienced frequent, but relatively mild, forest fires caused primarily by lightning and Native American activity.[2] These fires would

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[1] *See* Robert B. Keiter, *Keeping Faith with Nature: Ecosystems, Democracy, and America's Public Lands* 136, 140-141, 155 (2003); Marlin A. Johnson, *Changed Southwestern Forests: Resource Effects and Management Remedies, at* <http; //www.cpluhna.nau.edu/Research/changed_southwestern_forests.htm> (last visited Dec. 23, 2003); W. Wallace Covington et al., *Restoring Ecosystem Health in Ponderosa Pine Forests of the Southwest,* 95 *Journal of Forestry*, April 1997, 23, 23, 27 tbl.1, *corrected adaptation available at* http://www.cpluhna.nau.edu/Research/pinerestoration.htm (last visited Dec. 23, 2003); *see generally* Robert E. Keane et al., *Cascading Effects of Fire Exclusion in Rocky Mountain Ecosystems: A Literature Review* (U.S. Forest Serv. Gen. Technical Report RMRS-91, 2002).

[2] Researchers have found that pre-European human inhabitants of North America used fire and other techniques to alter the "natural" character of the forests. *See* Keiter, *supra* note 1, at 136 & 376-77 n.15; Stephen J. Pyne, *A Cultural History of Wildland and Rural Fire* 46-50, 66-83 (1982); Homer Aschmann, *Aboriginal Use of Fire,* in *Proceedings of the Symposium on the Environmental Consequences of Fire and Fuel Management in Mediterranean Ecosystems* 132 133, 135, 137-38 (Harold A. Mooney & C. Eugene Conrad technical coordinators, U.S. Forest Serv. Gen. Technical Report WO-3, 1977); George E. Gruell, *Indian Fires in the Interior West: A Widespread Influence,* in *Proceedings of the Symposium and Workshop on Wilderness Fire* 68 (James E. Lotan et al. technical coordinators, U.S. Forest Serv. Gen. Technical Report INT-182, 1985); Henry T. Lewis, *Why Indians Burned: Specifies Versus General Reasons,* in *id.* 75.

Some speculate that before the arrival of the ancestors of Native Americans on this continent, forests were denser, and that it was the Native American's deployment of fire that created the savannah-like forests that European explorers encountered that are now deemed "natural." *See, e.g.,* Pyne, *supra*, at 79 ("[T]he general consequence of the Indian occupation of the New World was to replace forested land with grassland or savannah, or, where the forest persisted, to open it up and free it from the underbrush."); Nancy Langston, *Forest Dreams, Forest Nightmares: The Paradox of Old Growth in the Inland West* 46-

clear the forest floor of undergrowth and saplings while leaving the larger trees unscathed. The denser forests produced by fire suppression accumulate more combustible fuel and are more vulnerable to infestations, such as mountain pine beetles, and to fires far more intense and devastating than those of the pre-settlement era.[3] Forestry experts are divided as to the response to these conditions. Some advocate a hands-off approach, allowing fire (outside areas of human habitation) to reconstitute the forests in their natural state; some advocate controlled burns; and some advocate thinning and fuel removal.[4] The role of commercial logging as part of the last approach has been particularly controversial.

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48 (1995) (agreeing that Native American fires helped to open up the forest, but denying that they were primarily responsible for creating the grasslands). *But, see, e.g., in the Southwestern United States since AD 1700*, in *Proceedings of the Second La Mesa Fire Symposium* 11, 29 (C.D. Allen ed., U.S. Forest Serv. Gen. Technical Report RM-286, 1996) (arguing that because fuels and climatic conditions controlled the extent of forest fires more than ignition sources did, Native American activity in the Southwest did not significantly alter preexisting fire patterns).

[3] *See* Keane et al., *supra*, note 1, at 14-15; Keiter, *supra* note 1, at 141; Langston, *supra* note 2, at 296-97.

[4] Keiter, *supra* note 1, at 141 & 378 n. 27. *Compare* Michael Axline, *Forest Health and the Politics of Expediency*, 26 Envtl. L. 613, 626-39 (1996) (arguing that there is no forest health emergency because fire and insect infestation are natural parts of forest ecology, and dismissing tree-thinning measures as motivated by logging interests), *with* James K. Agee, *Alternatives for Implementing Fire Policy*, in *Proceedings: Symposium on Fire in Wilderness and Park Management* 107, 108-111 (James K. Brown et al. technical coordinators, U.S. Forest Serv. Gen. Technical Report INT-320, 1995) (warning that given the current unnatural forest densities, it would be foolish to rely on natural fires without prescribed burns to reproduce natural forest ecosystems), *and with* Covington et al., *supra* note 1, at 24-25 (noting that because prescribed burns are difficult to control and unpredictable in their results, they must be supplemented by tree thinning and deadwood removal); Johnson, *supra* note 1 (recommending a mixed strategy using natural fires, prescribed burns, and tree thinning). *See also* Langston, *supra* note 2, at 260-63 (expressing doubt about the possibility of successfully engineering a return to the old forests by any method).

From 1983 to 1997, the Beaver Park Roadless Area, a relatively pristine portion of the Black Hills National Forest, was free of logging activity, apparently because the land management plan then in place did not allow it. In 1997, however, the Forest Service approved a new Black Hills National Forest plan revision (the "1997 Revised Plan"), which allowed logging in a significant portion of Beaver Park's 5,109 acres. It subsequently began preparations for a timber sale in an area called the "Veteran/Boulder Project Area," which included most of the Beaver Park land newly authorized for logging. Especially in a part of the area known as Forbes Gulch, a major purpose of the logging was to counter an infestation of mountain pine beetles. The Forest Service proceeded to clear various administrative hurdles in preparation for the Veteran/Boulder timber sale, issuing a final environmental impact statement on the proposed sale and records of decision approving timber harvest both inside and outside the Beaver Park Roadless Area.

Several environmental groups, including the Sierra Club, the Wilderness Society, and Appellant Biodiversity Conservation Alliance (BCA),[5] objected strenuously to the timber sale. The Beaver Park Roadless Area was one of the last areas in the Black Hills National Forest still eligible for designation as a wilderness, and logging activity would likely disqualify it from being designated as such.[6] The environmental groups were also concerned about the effects

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[5] At the time of these events, BCA was known as Biodiversity Associates. For the sake of simplicity, we use its current name.

[6] The Wilderness Act requires that a wilderness area have "at least five thousand acres of land or... sufficient size as to make practicable its preservation and use in an unimpaired condition." 16 U.S.C. § 1131(c)(3). Since recently logged areas are not eligible for wilderness protection, the proposed logging would decrease the eligible acreage of the Beaver Park Roadless Area below the 5,000-acre threshold, potentially compromising its eligibility for wilderness designation for the indefinite future.

that the Veteran/Boulder timber sale would have on the viability of the northern goshawk population in the Forest. Accordingly, they brought administrative challenges to both the particular project and the recently revised plan under which it was approved.

The groups met with mixed success in their administrative challenges. Their challenge to the Veteran/Boulder sale was initially denied in its entirety, though the sale was stayed pending review of the Revised Plan itself. Then, on October 12, 1999, the Chief of the Forest Service upheld the 1997 Revised Plan in most respects, but found that there was inadequate support in the record for the conclusion that the Revised Plan's proposed changes would not threaten the viability of several species, including the northern goshawk. He therefore ordered further research into that question. In the meanwhile, the Forest Service did not stop all pending projects, but instead provided interim directions that would apply until the identified defects in the Revised Plan were remedied. As a result, when the stay on the sale expired, the Forest Service went forward and put the timber out for bid.

The Sierra Club, the Wilderness Society, and BCA brought suit challenging the sale in federal district court claiming that the Forest Service could not rely on an "illegal" plan to justify project-level decisions under that plan. Specifically, they argued that the final environmental impact statement's conclusion that the Veteran/Boulder sale would not affect the viability of the northern goshawk was based on the very findings in the 1997 Revised Plan that had been disapproved.

In the waning days of the Clinton Administration, in September of 2000, the Forest Service signed a settlement agreement with the plaintiff groups, under which it agreed not to allow any tree cutting in the Beaver Park Roadless Area, at least until the Service approved a new land and resource management plan remedying the defects of the 1997 plan. The settlement was approved by the United States District Court for the District of Colorado, which had

jurisdiction over the lawsuit because the relevant Forest Service offices were in Colorado.

The process of approving a new plan took much longer than anticipated. The record does not reveal whether the mountain pine beetles of western South Dakota were aware of the settlement agreement or participated in the plan revision process, but it is clear that they did not wait for authorization from Washington before undertaking an expanded program of forest resource exploitation. Just two years after the initial Veteran/Boulder environmental impact statement, the mountain pine beetle infestation in this section of the Black Hills had reached epidemic proportions. According to Forest Service estimates, the pine beetles killed 114,000 trees in 2002, as compared to only 15,000 in 1999. This convinced forest managers that the immediate harvesting of deadwood and infested trees, which the settlement agreement prohibited, was necessary to guard against further spread of the infestation and potentially disastrous forest fires.

Given that approval of a corrected resource plan was still a long way off, the Forest Service and the local South Dakota interests that shared its concerns had a choice: they could either attempt to obtain consent to the tree cutting from the original parties to the agreement, or with the help of South Dakota's congressional delegation, they could attempt to overturn the settlement agreement's prohibition by legislation. The Forest Service began by trying the consensual approach. Perhaps spurred by the threat of intervention from Congress, the signatories to the settlement met with the Forest Service to discuss changing the agreement in light of the mountain pine beetle problem. The Forest Service reached agreement with the Sierra Club and the Wilderness Society, but the BCA and Brian Brademeyer, then chair of the Black Hills Sierra Club, refused to agree to

proposed modifications in the settlement.[7] Stymied, South Dakota interests turned to Congress for a legislative solution.

For some years, Congress had been considering national legislation that would streamline the process of obtaining environmental approval of logging and other clearance projects in fire- and disease-threatened national forests; but these efforts were caught up in the debate over the role of commercial logging in forest restoration. By limiting legislative action to a narrow geographical area, however, and with the acquiescence of some influential environmental groups and the active support of the state's congressional delegation, Congress was able to reach agreement on a bill that would permit logging and other measures in the Beaver Park Roadless Area. In a rider to an unrelated appropriations bill, Congress enacted into law essentially the terms of the modified agreement negotiated between the Forest Service and the Sierra Club and the Wilderness Society. *See* Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States, Pub. L. No. 107-206, § 706, 116 Stat. 820, 864 (2002) (the "706 Rider" or "Rider"). The Rider, which was signed into law on August 2, 2002, required the Forest Service to take a variety of actions that violated the settlement agreement, *see, e.g., id.* § 706(d)(5), 116 Stat. at 867, and prohibited judicial review of those actions, *id.* § 706(j), 116 Stat. at 868. It also specifically referred to the settlement agreement, and stated that the agreement should continue in effect to the extent it was not preempted by the Rider. *See id.*, 116 Stat. at 869.

After the Rider was passed, BCA and Mr. Brademeyer (hereinafter referred to, jointly, as "BCA") went to the federal district court in Colorado to obtain an order

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[7] Mr. Brademeyer had represented the Sierra Club in the settlement modifications negotiations, but resigned after higher-ups in the Sierra Club agreed with the Forest Service to allow certain tree-cutting activities in the Black Hills National Forest, which he considered to be a "suspension of the law." Brademeyer Decl. ¶ 13, App. 299-300.

requiring continued enforcement of the settlement agreement, claiming that the 706 Rider unconstitutionally trenched on both the executive and judicial branches. The district court denied the motion, and BCA appealed.

DISCUSSION

I

As a preliminary matter, we must determine the scope of this Court's jurisdiction over this case. Although we would normally have jurisdiction under 28 U.S.C. § 1291, the 706 Rider limits that jurisdiction:

> Due to the extraordinary circumstances present here, actions authorized by this section shall proceed immediately and to completion notwithstanding any other provision of law including, but not limited to, NEPA and the National Forest Management Act (16 U.S.C. 1601 et seq.). Such actions shall not be subject to the notice, comment, and appeal requirements of the Appeals Reform Act, (16 U.S.C. 1612 (note), Pub. Law No. 102-381 sec.322). *Any action authorized by this section shall not be subject to judicial review by anycourt of the United States.*

Rider § 706(j), 116 Stat. at 868 (emphasis added). At oral argument, BCA contended that the italicized language does not preclude us from considering the constitutionality of the Rider itself. The government disagrees, arguing that we have jurisdiction at most to determine whether the denial of jurisdiction, not the entire Rider, is constitutional.

In determining the extent of our jurisdiction, we must start with the precise language of the Rider, keeping in mind that such limitations of jurisdiction are to be construed narrowly to avoid constitutional problems. *See Johnson v. Robison,* 415 U.S. 361, 366-67 (1974). What is prohibited here is judicial review of "[a]ny action authorized by" the Rider. Rider § 706(j), 116 Stat. at 868, BCA, however, does not seem to be seeking judicial review of any specific actions

already taken or soon to be taken by the Forest Service. Rather, it has moved for enforcement of the settlement agreement in the face of the new Congressional legislation. Admittedly, the basis for the lawsuit, and the alleged injury that gives BCA standing, is the prospect of Forest Service action pursuant to the Rider and in violation of the settlement agreement. Yet at this point, no past or prospective actions of the Forest Service are directly at issue. The question before us is simply whether the settlement agreement has continuing validity in the face of Congress's intervening act.

The situation here is thus different from one in which the court is asked to hold a party who has violated an injunction in contempt. In such a case, the "actions" taken by a party to the injunction are directly at issue. BCA's motion is more analogous to a suit for declaratory judgment holding the Rider itself to be unconstitutional. Because BCA seeks judicial review of the congressional act mandating that the settlement agreement be violated, rather than judicial review of the Forest Service's acts authorized by the Rider, the jurisdictional bar does not apply. *See Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001). We therefore must reach the question of whether the Rider is constitutional. Because this question is purely legal, our review is de novo. *See United States v. Pompey*, 264 F. 3d 1176, 1179 (10th Cir. 2001).

II

BCA's chief argument is that the Rider trenches on the Executive by giving the Forest Service marching orders so detailed that they go beyond merely "passing new legislation" to interpreting the law, which is "the very essence of 'execution' of the law." *Bowsher v. Synar,* 478 U.S. 714, 733 (1986). However, they never clearly explain what, in their view, separates permissible legislation from impermissible interpretation. The main flaw they find in the Rider is its extreme particularity, making it seem as if their theory is that exreme particularity by itself infringes the Executive's power to enforce and execute the law. At times, though, they make a more limited claim: that while

specificity is not *per se* unconstitutional, at least in this case it is "indicative" of the fact that Congress has unconstitutionally "direct[ed] how law is to be implemented," rather than (unconstitutionally) changing the applicable law. Appellants' Reply Br. 5. This more limited claim suggests that it is particularity in combination with some other feature that raises the constitutional problem. We consider each theory in turn.

A

BCA bases its argument on a handful of cases in which the Supreme Court has held that the legislative branch cannot play a role in the interpretation and execution of the law. *See, e.g., Metro. Washington Airports Auth. V. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271-72 (1991); *Bowsher*, 478 U.S. at 725-26; *INS v. Chadha,* 462 U.S. 917, 951-52 (1983); *Springer v. Philippine Islands*, 277 U.S. 189, 201-02 (1928). There is no basis, however, for BCA's assertion that the sheer specificity of the 706 Rider takes it beyond the realm of Congress's legislative powers. Certainly the cases cited above do not support this position. In each of those cases, Congress sought a role for itself in the execution of the laws, beyond enactment of legislation, through mechanisms such as a one-house legislative veto or the vesting of law-executing powers in officers appointed by, or accountable to, Congress. In *Bowsher*, the Court held that the Comptroller General, who serves at the pleasure of Congress, could not be the officer who determined what spending cuts would be made in order to reduce the deficit under the Gramm-Rudman-Hollings Act of 1985. 478 U.S. at 717-18, 736. *Springer* held that it violated separation of powers for members of the legislative branch to be directors of government-owned businesses. 277 U.S. at 202-03. Similarly, *Metropolitan Washington Airports* struck down an arrangement whereby a board of review composed of members of Congress had authority to veto key acts of the Metropolitan Washington Airport Authority. 501 U.S. at 275-77. *Chadha* struck down a law that delegated authority to the Attorney General to suspend certain deportations, but

allowed either house of Congress acting alone to veto the Attorney General's decisions. 462 U.S. at 923, 944-59. None of these cases, or any others of which we are aware, suggest that Congress is required to speak with some minimum degree of generality, so as to leave play for the Executive to exercise discretion in interpreting the law. Rather, the Constitution expressly leaves it up to Congress to determine how specific it may deem it "necessary and proper" for the laws to be. U.S. Const. Art. I, § 8, cl. 18. The cases cited above have simply forbidden Congress, or its members or servants, from exerting legal authority without observing the formalities for the passage of legislation under the Constitution: "bicameral passage followed by presentment to the President." *Bowsher* 478 U.S. at 726 (quoting *Chadha*, 462 U.S. 954-55). This is a structural and institutional means of guaranteeing that Congress stays within the bounds of legislating, and is far superior to asking courts to police the shades of gray between the poles of general and specific.

To be sure, the Constitution imposes certain specific constraints on the power of Congress to legislate with overmuch particularity. The Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3, and the "uniform Duties, Imposts, and Excises" Clause, *id.*, § 8, cl. 1, are examples. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468-73 (1977); *United States v. Ptasynski*, 462 U.S. 74, 80-85 (1983). Due process and equal protection principles similarly prevent Congress from acting with respect to specific persons or groups in some contexts, and specificity may be relevant to determining whether Congress has trenched on the Executive's ability to carry out its specifically enumerated executive powers. *Nixon*, 433 U.S. at 443. But when Congress is exercising its own powers with respect to matters of public right, the executive role of "tak[ing] Care that the Laws be faithfully executed," U.S. Const. art. II, §3, is entirely derivative of the laws passed by Congress, and Congress may be as specific in its instructions to the Executive as it wishes. Indeed, as the Supreme Court has

noted, Congress may even pass legislation governing "a legitimate class of one." *Nixon*, 433 U.S. at 472.

In the instant case, none of the Constitution's explicit restrictions on specificity apply. The Property Clause states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Supreme Court has "repeatedly observed that the power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (internal brackets and quotation marks omitted); *see also Wyoming v. United States*, 279 F. 3d 1214, 1227 (10th Cir. 2002). It would be difficult if not impossible to control the use of federal lands without reference to specific actions affecting specific tracts of land, and we see no reason why Congress should be forced to avoid such directives. *See Save Our Mall*, 269 F.3d at 1097 (noting that particularity is especially unproblematic when addressing unique public amenities). The Supreme Court's remark in *Metropolitan Washington Airports* seems relevant here:

> Because National and Dulles are the property of the Federal Government and their operations directly affect interstate commerce, there is no doubt concerning the ultimate power of Congress to enact legislation defining the policies that govern those operations. *Congress itself can formulate the details*, or it can enact general standards and assign to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards.

501 U.S. at 271-72 (emphasis added).

Thus, BCA is mistaken when it argues that Congress has arrogated power to itself at the expense of the executive branch because it "specifically ordered the Executive Branch

to carry out a duty which had been expressly delegated to the Department of Agriculture, the management of the Black Hills National Forest." Appellants' Br. 23. To give specific orders *by duly enacted legislation* in an area where Congress has previously delegated managerial authority is not an unconstitutional encroachment on the prerogatives of the Executive; it is merely to reclaim the formerly delegated authority. Such delegations, which are accomplished by statute, are always revocable in like manner; they cannot extend the domain reserved by the Constitution to the Executive alone. *See Stop H-3 Ass'n v. Dole,* 870 F.2d 1419, 1435 n.24 (9th Cir. 1989).

B

We now turn to consider the view that although the 706 Rider's specificity is unobjectionable in the abstract, it is still unconstitutional because it attempts to mandate specific results *without* changing the underlying environmental laws. BCA relies for this view chiefly on *Robertson v. Seattle Audubon Society*, where the Supreme Court upheld a similar provision because it "compelled changes in law, not findings or results under old law." 503 U.S. 429, 438 (1992); *see also Apache Survival Coalition v. United States*, 21 F.3d 895, 904 (9th Cir. 1994); *Stop H-3 Ass'n*, 870 F.2d at 1434 (upholding a statute authorizing construction of a highway despite an environmental regulation because it "does not interpret [the relevant regulation's] requirements but rather exempts H-3 from them"); *Armuchee Alliance v. King,* 922 F. Supp. 1541, 1550 (N.D. Ga. 1996).

Far from supporting BCA's position, however, *Seattle Audubon* rejects an argument very much like its own. The case concerned logging litigation to which Congress responded by passing the Northwest Timber Compromise of 1990, applicable only to timber sales entered before September 30, 1990, in thirteen national forests in the Pacific Northwest. The key section of that legislation stated that "Congress determines and directs that management of areas according to [new rules set forth in the Northwest Timber Compromise]... meet[s] the statutory requirements that are

the basis for [the litigation]." 503 U.S. at 434-35. The Ninth Circuit, below, had held that this did not "establish new law, but direct[ed] the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court," thus encroaching on the judicial branch under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1316 (9th Cir. 1990) (*Seattle Audubon I*). In reversing, the Supreme Court criticized the Ninth Circuit's focus on the form of the enactment; instead, it looked to the legal effect of the *Seattle Audubon* provision:

> We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law.
> Before subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting
> violated none of the five old provisions.
> Under subsection (b)(6)(A), by contrast, those same claims would fail if the harvesting violated neither of two new provisions.
> Its operation, we think, modified the old provisions.

Seattle Audubon, 503 U.S. at 438.

This case follows *a fortiori* from *Seattle Audubon*. Just as in *Seattle Audubon*, the 706 Rider has the practical effect of changing the scope of the government's legal duties. Before the Rider, the Forest Service was prohibited by law from cutting trees without meeting various requirements of various environmental laws; after the Rider, it is required to cut trees in the Black Hills "notwithstanding" those laws. Rider § 706(j), 116 Stat. at 868. But the 706 Rider lacks the problematic language – "the Congress determines and directs that management of areas according to [new rules set forth in the Northwest Timber Compromise]... meet[s] the statutory requirements that are the basis for [the litigation]" – which the Ninth Circuit construed as interpreting rather than amending the law.

Seattle Audubon I, 914 F.2d at 1316. By contrast, the 706 Rider orders that certain actions be taken "notwithstanding" the requirements of certain prior-enacted laws, thus effectively replacing the old standards, in this one case, with new ones. Similar statutes have been upheld as constitutionally valid amendments of the underlying law. *See Save Our Mall*, 269 F.3d at 1097; *Apache Survival Coalition*, 21 F.3d at 904; *Stop H-3 Ass'n*, 870 F.2d at 1424. Thus, we need not decide whether directing specific actions without changing the law would be an unconstitutional attempt by Congress to usurp the Executive's role in interpreting the law.[8] In accordance with the counsel in *Bowsher*, Congress has influenced the execution of the law here only "indirectly – by passing new legislation." 478 U.S. at 734 (citing *Chadha*, 462 U.S. at 958).

III

Next, BCA claims that the 706 Rider encroaches on the Judiciary, in three ways: (1) by disturbing final dispositions of cases in violation of *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995); (2) by prescribing rules of decision to the Judiciary in pending cases, in violation of *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871); and (3) by vesting review of judicial decisions in the executive branch, in violation of the rule in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1972). We reject all three claims.

A

BCA's first contention, that the 706 Rider impermissibly sets aside a final judicial disposition, depends

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[8] We underscore that by relying on the fact that the 706 Ricer changed applicable law, we do not mean to suggest, any more than did *Seattle Audubon*, that if the Rider had not changed the law it would necessarily have run afoul of *United States v. Klein*. By interpreting the provision at issue in *Seattle Audubon* as a change in the law, the Supreme Court expressly avoided addressing any such constitutional question. 503 U.S. at 441. Thus, if a provision cannot be read as a change in the law, the most that follows from this case or *Seattle Audubon* is that the constitutional question of whether there is a *Klein* violation must be faced – not that it must be answered in the affirmative.

on a crucial but questionable premise: that the settlement agreement is actually a judicial disposition rather than a mere private agreement between the parties. Although the district court did incorporate the settlement agreement by reference in its order dismissing the suit, it nevertheless preferred the latter characterization in addressing BCA's current request for injunctive relief:

> This case doesn't even rise to the level where the Court executed a consent decree. This is a case where the parties sat down among themselves and settled the case.
> The more proper analogy here is to an executory settlement contract. It is true that the Court approved the settlement, agreement, but that is different from a consent decree.
> . . . . . [A]s far as I'm concerned, the Court's approval of the settlement agreement is entitled to very, very little weight, because it was negotiated among the parties.

Tr. of Mot. Hr'g dated Dec.26, 2002, at 12, App. 405. Nevertheless, because the settlement agreement was a judicial disposition in form if not in substance, we assume for purposes of this appeal that it is entitled to the same constitutional protection that it would have if the court had decided its terms.

1

Within the scope of its enumerated powers, Congress has authority to enact laws to govern matters of public right, such as the management of the public lands, and authority to change those laws. Even when the Judiciary has issued a legal judgment enforcing a congressional act – for example, by a writ of injunction – it is no violation of the judicial power for Congress to change the terms of the underlying substantive law. The purpose of an injunction is to define and enforce legal obligations, not to freeze them into place. Thus, when Congress changes the laws, it is those amended laws – not the terms of past injunctions – that must be given

prospective legal effect. *See, e.g., Miller v. French*, 530 U.S. 327, 347-50 (2000); *Hall v. Beals*, 396 U.S. 45, 48 (1969); *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 648-650 (1961); *Am Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 201007 (1921).

The Supreme Court applied this principle to dispose of a contention very similar to BCA's as long ago as 1855, in the venerable case of *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). In that case, Pennsylvania had previously brought suit to enjoin the construction of a bridge over the Ohio River, which would obstruct access to Pennsylvania's ports. The Supreme Court eventually granted an injunction requiring the bridge to be removed or raised. It reasoned that because Congress had "regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same," the Virginia-authorized bridge impeding travel on the Ohio River was "in conflict with the acts of congress, which were the paramount law." 59 U.S. (18 How.) at 430 (summarizing the earlier opinion).

Thereafter, Congress passed a new law authorizing the construction of the bridge and stating that the bridge and one other were "lawful structures in their present positions and elevations." *Wheeling Bridge*, 59 U.S. (18 How.) at 429. Pennsylvania sued again, claiming that the intervening enactment was an unconstitutional attempt to overturn a final decision of the Judiciary. The Supreme Court disagreed:

> [I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the powers of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. . . . But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the

> bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with the law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree.

Id. at 431-32. Central to the Court's analysis was the fact that the right to unobstructed waterways was a "public right ... under the regulation of congress." *Id.* at 431. In other words, the plaintiff had no vested property right in an unobstructed waterway. The core violation was against Congress's right to control the waterways, and Pennsylvania's right to an unobstructed waterway was only the derivative right to enjoy whatever degree of navigation Congress saw fit to allow. So long as the will of Congress was to leave the river unimpeded, any impediment was a violation of the public right thus defined. But once Congress changed its mind, the contours of that right changed, and there was no more ground for injunctive relief. If a landowner grants her neighbor a revocable license to use a private road across her property, the neighbor could conceivable obtain an injunction against the any third party who prevents him from using that road. However, that does not affect the fight of the landowner to revoke the license at any time. Should the license be revoked, the neighbor's right to use the private road ceases, and enforcing the injunction is longer appropriate.

Wheeling Bridge has remained a fixed star in the Supreme Court's separation-of-powers jurisprudence, and numerous subsequent cases have relied on it. *See, e.g., The Clinton Bridge*, 77 U.S. 454, 463 (1870) (concluding, on the basis of *Wheeling Bridge*, that in public rights cases, Congress could not only modify injunctive relief already granted, but also could "g[i]ve the rule of decision" in pending cases); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923) (noting that the normal rule against disturbing final judgments "does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced"); *Sys. Fed'n No. 91*, 364 U.S. at 648-650 (holding that it is an abuse of discretion for a district court not to modify an injunction to reflect changes in underlying law); *Miller v. French*, 530 U.S. at 347-48.

Even *Plaut v. Spendthrift Farms, Inc.*, the principal case on which BCA relies, is careful not to disturb the holding of *Wheeling Bridge*. There the Supreme Court had previously imputed a uniform nationwide statute of limitations on actions brought under § 10(b) of the Securities Exchange Act of 1934, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and held that the newly established statute of limitations applied to all pending cases in the federal courts. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Six months later, Congress passed a law changing the statute of limitations for those cases commenced before *Lampf* to what it would have been had the Supreme Court not imposed a uniform nationwide limitations period, and reinstating all actions dismissed as time-barred if they would have been timely under the limitations period of their local jurisdiction. *See* Federal Deposit Insurance Corporation Act of 1991, Pub. L. No. 102-242, sec. 476, § 27A, 105 Stat. 2236 (codified at 15 U.S.C. § 78aa-1 (1988 Supp. V.)). The Supreme Court held that this action violated the separation of powers by requiring federal courts to reopen final judgments. *Plaut*,

514 U.S. at 240. It reasoned that once the judicial branch has given its final word on a case, to allow Congress to reopen the case by legislation would destroy the power of the Judiciary to render final judgments. *Id.* at 219. Instead, Congress would be in effect a court of last resort to which one could appeal any "final" decision of the Judiciary.

In rejecting such an outcome, the Court in *Plaut* did no more than follow the dicta of *Wheeling Bridge* itself:

> But it is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the *private rights of the parties*. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.
>
> . . . .
>
> Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the Plaintiff *for damages*, the right to these would have passed beyond the reach of the power of congress.

Wheeling Bridge, 59 U.S. (18 How.) at 431 (emphasis added), *quoted in Plaut*, 514 U.S. at 226. As *Plaut* itself insists, it does not call the holding of *Wheeling Bridge* into question at all. 514 U.S. at 232. The disturbed court decision in *Plaut* definitively resolved a private claim to a certain amount of money, leaving the defendants with an unconditional right to the sum in question; the judgments in this case and in *Wheeling Bridge* merely prohibited future interference with the enjoyment of a public right that remained revocable at Congress' pleasure.

The Supreme Court has since reaffirmed the continued vitality of *Wheeling Bridge* in *Miller v. French*. In that case, the Prison Litigation Reform Act had set new limits on the power of courts to give injunctive relief to

prisoners, requiring (among other things) that any injunctive relief granted be both narrowly drawn to correct the violation of federal rights and also the least intrusive means of correcting the violation. 18 U.S.C. § 3626 (a)(1)(A). The provision at issue in *Miller* directed that an action to modify or terminate injunctive relief pursuant to the PLRA would act as an automatic stay of any existing injunctive relief if a court did not find that the injunctive relief remained appropriate under the new standards within 30 days. *Id.* § 362(b)(2).

In upholding the PLRA's automatic stay, the Supreme Court found *Wheeling Bridge* controlling, distinguishing *Plaut* because in that case Congress had disturbed final judgments in actions for money damages. *Miller*, 530 U.S. at 344-345. The Court held that when courts grant prospective injunctive relief, they remain obligated to modify that relief to the extent that "subsequent changes in the law" render it illegal. *Id. at 347.*

3

This case falls squarely within the principle of *Wheeling Bridge*. BCA's members' rights with respect to the national forests is a "public right . . . under the regulation of congress," *Wheeling Bridge*, 59 U.S. (18 How.) at 431, in exactly the same way that the right to unimpeded navigation of the Ohio River was. Both rights are entirely contingent on Congress' continuing will that the federal lands or interstate waterways be managed in a particular way. The settlement agreement in the Veteran/Boulder matter in no way touched on vested private rights. To be sure, the private interests of BCA's members are sufficiently affected to give rise to standing, but the interest they represented in their lawsuit was nothing other than the interest of the public in seeing that Congress's environmental directives are observed by the Forest Service.

BCA's attempts to distinguish *Miller* and *Wheeling Bridge* are unavailing. It argues, first, that in those cases, Congress simply changed the law, leaving it for the courts to decide whether to modify their injunctions, whereas here

Congress is directly requiring the courts to modify the settlement agreement. We see no such distinction. In those cases, as here, Congress enacted rules in direct conflict with existing legal obligations. In those cases, as here, courts later had to decide whether those previous legal obligations remained enforceable in light of Congress's act.

Second, BCA argues that the 706 Rider specifically refers to a particular settlement agreement it means to supercede, whereas the PLRA provision in *Miller* "did not speak directly to any pre-existing judicial ruling or issuance of relief." Appellants' Br. 27. The same was true in *Wheeling Bridge*. There, legislation was targeted at two named bridges, one of which was the subject of the injunction in the case. *See* 59 U.S. (18 How.) at 429. It is true that in *Seattle Audubon*, the Court declined to address the question of whether such targeting raised a constitutional problem. 503 U.S. at 441. However, its silence ended four years later in *Plaut*. There, a concurrence found a constitutional violation precisely because the reopening of dismissed cases "applie[d] only to a few individual instances." 514 U.S. at 243 (Breyer, J., concurring). A majority of the Court rejected this position, describing it as "wrong in law." *Id.* at 238. The majority concluded that the infringement of the judicial power consisted "*not* of the Legislature's acting in a particularized and thus (according to the concurrence) nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized." *Id.* at 239 (emphasis in original; footnote omitted); *see also id.* at 239 n.9 ("While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of operation.").

To avoid constant interbranch friction, the lines separating the branches should be clear. AS the Supreme Court noted in *Plaut*, and as BCA's arguments illustrate, it only "prolongs doubt and multiplies confrontation" to make the constitutional analysis hinge on the murky distinction

between generalized lawmaking and particularized application of the law. 514 U.S. at 240.

4

It is true that the injunction BCA seeks to enforce differs from the one in *Wheeling Bridge* in that it is the product of a settlement agreement rather than a product of a judicial declaration of right. Thus, Appellants' claimed right to keep Beaver Park unmolested might be said to rest directly on the terms of their contractual agreement, and only indirectly on public rights provided by the environmental laws. We must therefore consider whether the settlement agreement has interposed a new set of contractual rights that adequately support keeping the injunction in place, making changes to the scope of the underlying public right irrelevant.

A negative answer to that question has been clear since at least 1961, when the Supreme Court decided *System Federation No. 91 v. Wright*, 364 U.S. 642, 648-650 (1961). In that case, several nonunion railway employees brought a class action against the railroad and various unions for discrimination against them and other nonunion workers. The district court eventually entered a consent decree enjoining the defendants "from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employees to join or retain their membership in any of defendant labor organizations, or any labor organization." *Sys. Fed'n*, 364 U.S. at 644. At the time, labor law did not allow collective bargaining agreements to require union shops. *Id.* at 645-46.

Later, when the applicable law had changed to allow such contracts, the unions sought modification of the decree to make it clear that it would not prevent them from bargaining for a union shop. *Id.* The district court refused to modify the injunction; since nothing in the amended law made it illegal for parties to agree *not* to have a union shop, the court concluded that the parties were stuck with their agreement. *Id.*

The Sixth Circuit affirmed, but the Supreme Court reversed, holding the district court's refusal to modify the decree was an abuse of discretion. *Id.* at 646, 650-53. The Court reasoned that, under *Wheeling Bridge*, the district court would have had to modify the decree if it had been the result of litigation instead of consent. *Id.* at 650-51. It then concluded that the same principles applied to consent decrees:

> The result is all one whether the decree has been entered after litigation or by consent . . . In either event, a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not just as a judicial act . . . .

Id. at 650-51 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932) (Cardozo, J.) (some ellipses in original). The Court's reasons are also applicable here:

> The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and

> only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of that Act when its provisions are amended. The parties have no power to require of the court continuing enforcement of rights the statute no longer gives.

Id. at 651. Put briefly, a settlement agreement or consent decree designed to enforce statutory directives is not merely a private contract. It implicates the courts, and it is the statute – and "only incidentally the parties" – to which the courts owe their allegiance. The primary function of a settlement agreement or consent decree, like that of a litigated judgment, is to enforce the congressional will as reflected in statute. The court should modify or refuse to enforce a settlement agreement or proposed decree unless it is "in furtherance of statutory objectives." The agreement or consent decree is contractual only to the extent that it represents an agreement by the parties regarding the most efficient means of effectuating their rights under the statute. It does not freeze the provisions of the statute into place. If the statute changes, the parties' rights change, and enforcement of their agreement must also change. Any other conclusion would allow the parties, by exchange of consideration, to bind not only themselves but Congress and the courts as well.

This principle applies even more clearly here than it did in *Systems Federation* itself. There, the original injunction was not inconsistent with the new law; it merely ruled out an option that Congress had since made permissible but not mandatory. If that injunction had to change, the *a fortiori* the injunction at issue here, which *is* inconsistent with the 706 Rider, must give way.

B

Having disposed of the claim that the 706 Rider disturbs the district court's *final judgment* in violation of

Plaut, we turn to BCA's somewhat inconsistent claim that the Rider violates *United States v. Klein* because it dictates "rules of decision" to the district court in a *pending* case.

Klein involved one episode in a series of conflicts between the Reconstruction Congress and the balking President Andrew Johnson. Various presidential proclamations had offered a "full pardon, with restoration of all rights of property," to certain broad classes, conditioned on taking an oath of loyalty. *Klein*, 80 U.S. (13 Wall.) at 139-40. In the Abandoned and Captured Property Act, 12 Stat. 820 (Mar. 12, 1863), however, Congress provided that the owner of seized property could sue in the Court of Claims to recover its proceeds only on proof that the owner "had never given aid or comfort to the rebellion." *Id.* at 138-39. In *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1869) (mem.), the Supreme Court held that a presidential pardon renders the pardoned "as innocent as if he had never committed the offense," and concluded that proof of pardon was equivalent to proof that the claimant had not aided the rebellion. Congress responded to *Padelford* by passing an appropriations proviso directing the Court of Claims to take the fact of a pardon, with some narrow exceptions, as conclusive proof that the claimant *had* "given aid or comfort to the rebellion," and as grounds for dismissing the claimant's suit. *Klein*, 80 U.S. (13 Wall.) at 142-43. The proviso also removed the Supreme Court's authority to hear appeals of such suits. *Id.* at 144-45. In *Klein*, the administrator of the estate of V.F. Wilson, who had taken the oath and qualified for the pardon, sued to recover the proceeds of Wilson's seized property. *Id.* at 136, 43. The Supreme Court found the proviso to be unconstitutional, both because it attempted to impair the effect of a presidential pardon and because it "prescribed[d] rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

Klein is a notoriously difficult decision to interpret. Read broadly, the "rules of decision" language of *Klein* would seem to contradict the well-established principle that

courts must decide cases according to statutes enacted by Congress. *See United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801); *Miller*, U.S. at 344, 346-47.

In any event, the 706 Rider is very different from the unusual legislation found unconstitutional in *Klein*. Central to the Court's analysis in *Klein* was its conclusion that the government's seizure of the private property at issue did not divest its owner of his property rights. *See Klein*, 80 U.S. (13 Wall.) at 136-39. Thus, the bases of the *Klein* suit (at least in the eyes of the *Klein* court was a private right to property vindicated by a presidential pardon, which Congress was therefore powerless to extinguish. *See id.* at 148. Since Congress could not manipulate these private rights, *Klein* merely refused to allow Congress to accomplish indirectly (by manipulating the judiciary's interpretation of those private rights) what it could not accomplish directly.

Thus understood, *Klein* is precisely in accord with *Wheeling Bridge*, as *Klein* itself observes. *See* 80 U.S. (13 Wall.) at 146-47. When Congress does not control the substance of a right, there are limits to its ability to influence the judiciary's determination of that right, either by directing the judiciary to decide a particular way, or by setting aside judicial determinations after the fact. But when rights are the creatures of Congress, as they were in *Wheeling Bridge*, Congress is free to modify them at will, even though its action may dictate results in pending cases and terminate prospective relief in concluded ones. Thus, *Klein*'s prohibition on prescribing rules of decision in pending cases has no application to the public rights cases like this one.

The Supreme Court explicitly made this point in *The Clinton Bridge*, a case decided only one year before *Klein*. That case addressed facts almost identical to those in *Wheeling Bridge*. The only difference was that Congress passed legislation authorizing the bridge in question while the suit over its legality was still pending, not after the injunction issued. *See* 77 U.S. (10 Wall.) at 462-63. The Court noted that, in so doing, Congress "gave the rule of decision for the court" in the pending case. *Id.* at 463.

While it found that to be unobjectionable under *Wheeling Bridge*, it warned that "very different considerations would have arisen" if Congress had attempted to dictate the rules of decision in a case concerning a "private right of action." *Id.* *Klein* must be read as the fulfillment of that narrow warning, not the enunciation of any broader principle.[9]

Furthermore, the Supreme Court has made it clear that *Klein* does not apply to cases like this one: "Whatever the precise scope of *Klein*, . . . its prohibition does not take hold when Congress amends applicable law." *Plaut*, 514 U.S. at 218, *quoted in Miller*, 530 U.S. at 349 (internal quotation marks and brackets omitted). Because, as we explained in Part II of this opinion, the 706 Rider did "amend[] applicable law," the *Klein* principle does not apply here.

C

Last, BCA claims that the 706 Rider violates the rule in *Hayburn's Case*. *Hayburn's Case* has come to stand "for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*, 514 U.S. at 218. BCA admits that the 706 Rider does not literally authorize Forest Service officials to review judicial determinations. Nevertheless, it maintains that the 706 Rider orders the Executive to ignore and violate judicial orders, and that this is close enough to make out a claim under *Hayburn's Case*. We disagree. As discussed above, it is well-established that new law can modify old injunctive decrees. Whenever that happens, the new law at least implicitly orders the Executive to ignore the old decrees.

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[9] The same analysis disposes of BCA's contention that the 706 Rider disturbed the result in another then-pending case, *Sierra Club-Black Hills Group v. United States Forest Serv.*, No. 94-D-2273 (D. Colo. Feb. 20, 2003). Subsections (h) and (i) of the Rider directed the Forest Service to take specific actions in the Norbeck Wildlife Preserve, the area under dispute in the *Sierra Club* litigation.

BCA maintains that in such circumstances, Congress' act cannot constitutionally modify an injunction directly. Instead, it claims, any modification must be made by the court itself (though the court may be obliged to do it), and until the court does so, the injunction remains in force. Thus, because the 706 Rider directs the Forest Service to proceed with its tree-cutting activities regardless of whether the court modifies the settlement agreement, it unconstitutionally directs the Executive to ignore an injunction in force. But this is not the lesson of our cases. *Wheeling Bridge* held, not merely that Congress's legislation made modification of the injunction necessary, but that it rendered the injunction unenforceable. 59 U.S. (18 How.) at 432; *Miller*, 530 U.S. at 346. Similarly, the provision upheld in *Miller v. French* went beyond ordering judges to stay prospective relief after 30 days; instead, it stated that a motion to terminate injunctive relief "shall operate as a stay" of that relief beginning 30 days after the motion – thus staying the injunctive relief without any action by the court. *Miller*, 530 U.S. at 331. When Congress is acting within the boundaries set by *Wheeling Bridge* and *Miller*, the parties to a modified injunction need not wait upon the court to ratify the congressional change. Thus, we see no violation of *Hayburn's Case* or any other constitutional principle here.

IV

Viewed realistically, the 706 Rider intrudes on neither executive nor judicial authority. The Rider comports with the current view of executive branch officials regarding management of the national forest. And while the Rider overrides a settlement agreement entered by the district court, that agreement was in fact a private agreement between the parties, in which the Judiciary had little or no independent involvement. To overturn the Rider would thus serve not to vindicate the constitutionally entrusted prerogatives of those two branches, but rather to keeping place a private group's own preferences about forest

preservation policy in the face of contrary judgments by the Executive and Congress. True principles of separation of powers prevent settlement agreements negotiated by private parties and officials of the executive branch from encroaching either on the constitutionally vested authority of Congress or on the statutorily vested authority of those officials' successors in office. BCA's claim amounts to the argument that an agreement forged by a private group with a former administration, without serious judicial involvement, can strip both Congress and the Executive of their discretionary powers. The Constitution neither compels nor permits such a result.

The executive branch does not have authority to contract away the enumerated constitutional powers of Congress or its own successors, and certainly neither does a private group.[10] Accordingly, the governance of the Black Hills National Forest must be conducted according to the new rules set by Congress, as Article IV of the Constitution provides.

For the foregoing reasons, the district court's denial of BCA's motion is AFFIRMED.

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[10] Even when the Government unmistakably contracts not to exercise its sovereign powers in otherwise permissible ways, that promise cannot be enforced by injunction, as BCA seeks to do here. At most, such a contract may give rise in certain circumstances to a suit for damages. *See United States v. Winstar Corp.*, 518 U.S. 839, 910 (1996) (plurality opinion); *id.* at 923 (Scalia, J., concurring); *Perry v. United States*, 294 U.S. 330, 351-53 (1935); *Lynch v. United States*, 292 U.S. 571, 580 (1934); *The Sinking Fund Cases*, 99 U.S. 700, 718-19(1878). As the plurality stated in *Winstar*, "[t]he Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act." 518 U.S. at 881-82 (quoting *Amino Bros. v. United States*, 372 F.2d 485, 491 (Ct. Cl. 1967)). Appellants have made no claim for damages in this case, nor could they.